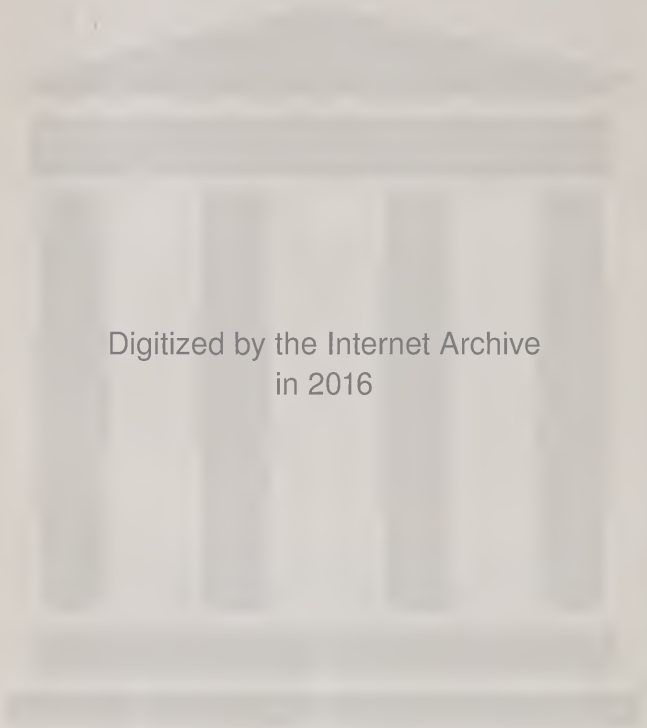

REPORTS

OF THE

NATIVE APPEAL COURTS

1956 (4)

VERSLAE

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NATURELLE-APPÈLHOWE

THE GOVERNMENT PRINTER, PRETORIA
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G.P.-S.1448340—1956-7—815.

NORTH-EASTERN NATIVE APPEAL COURT.

MDAKANE *v.* MDAKANE d.a. and NXUSA.

N.A.C. CASE No. 65 OF 1956.

VRYHEID: 2nd October, 1956. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

NATIVE LAW AND CUSTOM.

Dissolution of customary union—Lobolo *paid only in part*—*Custody of children of the union*—*Form of order.*

Summary: Plaintiff claimed a divorce from his wife who was assisted by her father who was cited as second defendant.

The divorce was granted and orders were made regarding the wife, the children and the *lobolo.*

Held: (1) An order for the payment of *lobolo* still due was not competent in an action for the dissolution of a customary union because it was not an issue before the Court.

Held: (2) It is undesirable to separate children who have grown up together by ordering that children of different ages be placed in the custody of one parent until they reach a certain age.

Held: (3) It is undesirable to order that children remain in the custody of a parent until a given age is reached in view of the difficulty in ascertaining when that age is attained.

Held: (4) That it is preferable that custody of children be awarded "until further order".

Cases referred to:

Kumalo *v.* Shamase d.a. 1942 (N. & T.), 55.

Statutes etc. referred to:

Section *eighty-one* of Natal Code of Native Law (Proclamation No. 168 of 1932).

Appeal from the Court of the Native Commissioner, Dundee.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff claimed a divorce from the first defendant, who was assisted by her father also cited as second defendant, on the grounds of desertion, the custody of the two minor children of the union and the return of his *lobolo.*

The Native Commissioner decided that living together had become unbearable chiefly because of the husband's conduct and he ordered "(1) that the customary union be dissolved; (2) that defendant No. 1 returns to the kraal of her father (defendant No. 2) where she has to remain under his guardianship; (3) the defendant No. 1 to have custody of the two children until their eighth year after which they are to be handed over to plaintiff; (4) the plaintiff is ordered to pay to defendant No. 2 the seven head of cattle still owing of which the defendant No. 2 will hand over three head to plaintiff; (5) each party to bear his own costs."

Against that judgment the plaintiff has appealed on the grounds that it is against the evidence and weight of evidence; that the Native Commissioner should have found that the blame was on the wife not on the husband; that the number of cattle the wife's

father should forfeit was not enough and that the number of cattle the husband still owed him was out of proportion; that in any case the Courts should have found that fewer cattle should have been paid to the wife's father.

It was held in the case of Kumalo *v.* Shamase d.a. 1942, N.A.C. (N. & T.), 55, that in circumstances similar to those in the case now on appeal, an order for the payment of *lobolo* still due was not competent because it was not an issue before the Court. The order made by the Native Commissioner that the plaintiff "pay to defendant No. 2 the seven head of cattle still owing" cannot therefore stand.

It was, however, common cause that plaintiff had paid second defendant four head of cattle and owed seven head—that is, only three head and the ngqutu beast had been paid—and it was also common cause that two children were born of the union. If, therefore, the plaintiff had been granted a divorce on the grounds of his wife's misconduct or desertion he would have been entitled to the return of one beast and to have been freed from paying the seven head he owed. But the Native Commissioner found that the blame was largely on the part of plaintiff and made the order mentioned above which amounts to a return of three head out of ten head leaving the father of the wife in possession of seven head (when the full number have been paid).

There can be no doubt from the record that the blame for the unhappy state of affairs was attributable to the plaintiff and were it not for the provision that when "conditions are such as to render the continuous living together of the partners insupportable or dangerous" a divorce may be granted, the divorce could not have been granted in the absence of a counterclaim.

If the divorce had been granted at the instance of the wife on the grounds of the husband's misconduct no cattle could have been ordered to be returned either from those delivered or from those admitted to be due and this Court is of opinion that the Native Commissioner's order unduly favoured plaintiff in that it considers he should not have been awarded more than that one beast in terms of section *eighty-one* of the Natal Native Code; but there is no cross-appeal and the number ordered to be returned must remain as it stands.

In view of the fact that the children are of different ages and because the Court considers it undesirable to separate children who have grown up together, the order that the two children in this case are placed in the custody of their mother "until their eighth year after which they are to be handed over to the plaintiff" is not regarded as being in the children's best interests although the custody was rightly granted to the mother. It should be borne in mind that the determination of the children's ages with any exactitude so as to be able to ascertain when they are to be given up by their mother will be extremely difficult and furthermore the Native Commissioner could not at the time he decided this case make an order that the children are to be handed over to plaintiff at a time some five or six years later.

This Court will amend this part of the order and lays it down for the future guidance of Native Commissioners that the form of order for custody appearing in the judgment below should be followed as nearly as the circumstances of each case allow. The order concerning the number of cattle to be returned will also be clarified by amendment.

The appeal is dismissed with costs but clauses Nos. (3) and (4) of the Native Commissioner's order are altered to read:—

"(3) that the custody of the two minor children of the union be and it is hereby awarded to their mother (defendant No. 1) *until further order.*

(4) That defendant No. 2 return to plaintiff three head of cattle when the seven head admitted by the latter to be still owing to the former are paid."

Rider by Steenkamp (President):—

I am constrained to remark that the record was not arranged in accordance with circular instructions.

The original is arranged in a different order to the copies. To give one example the original record opens with the reasons for judgment. This is so absurd that further comments are not necessary but the Native Commissioner should exercise more supervision over the Clerk of the Court who has obviously not followed the instructions.

For Appellant: Mr. H. L. Myburgh instructed by Acutt & Worthington.
For Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

MTIMKULU *v.* **MTIMKULU.**

N.A.C. CASE No. 59 OF 1956.

VRYHEID: 3rd October, 1956. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

PRACTICE AND PROCEDURE.

Rules of Evidence—Irregularities—Chief's reasons for judgment.
Summary: The facts of the subject matter of this case are not relevant.

The Native Commissioner, in trying a divorce action, referred to the register of customary unions for information regarding the *lobolo* paid although the register was not formally and properly handed into Court.

The Native Commissioner said that he relied on this inadmissible evidence for his judgment.

The Chief's reasons for judgment were in Zulu and were not translated into English or Afrikaans for the Court's information.

Held: (1) The rules of evidence in Native Commissioner's Courts must be strictly complied with even when the parties are not legally represented.

Held: (2) The reference by the Native Commissioner to the entry in the customary union register which had not been made available as evidence to the Court was irregular.

Held: (3) It does not follow that an irregularity must inevitably be followed by the granting of an appeal. Even without the consideration of the inadmissible evidence the plaintiff had established his case and the appeal cannot succeed.

Held: (4) There is nothing wrong with a Chief's reasons for judgment being furnished in Zulu but a translation of the reasons should be made and filed with the record for the use of the Native Commissioner and copies should be made for the Appeal Court if the case comes on appeal to it.

Appeal from the Court of the Native Commissioner, Nongoma.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff sued defendant in a Chief's Court for eleven head of cattle paid by plaintiff's father for the *lobolo* of defendant's wife. Defendant denied having used the cattle of plaintiff's father to *lobolo* his wife, but the Chief entered judgment for plaintiff for eleven head of cattle and costs having found that the evidence before him justified his finding that plaintiff's claim was proved. Defendant appealed against this judgment to the Court of the Native Commissioner where this appeal was dismissed with costs and the Chief's judgment was upheld and he has now appealed to this Court on the ground that the judgment is against the weight of evidence and the Native Commissioner should have absolved him from the instance.

In his reasons for judgment the Native Commissioner found it proved that eleven head of cattle were paid as *lobolo* for Makumalo—the woman who married first plaintiff's father and then defendant but he omitted to state that he found it proved that plaintiff's father's cattle were used by defendant to *lobolo* the woman when he married her.

The Native Commissioner did, however, find that plaintiff and his witnesses had spoken the truth and in this finding this Court agrees with him. But the Native Commissioner goes on—

> "Any doubt which might still have existed in the mind of the Court was banished by the inspection by the Court of the Customary Union Register in which the defendant declared that he obtained the *lobolo* cattle from his father."

There is nothing on record to show that the Native Customary Union Register was made available as evidence to the Court and it is clear that the Native Commissioner had no right to refer to entries in it before the particular entry had been properly put in as evidence and it is clear from the following further extract from his Reasons for Judgment that he relied on inadmissible evidence for his judgment.

> "The Court had no reason to doubt from the evidence and *the written record* that defendant's *lobolo* cattle were in fact paid from plaintiff's kraal."

This was an irregularity and although it should be obvious this Court cannot refrain from remarking that the rules of evidence in Native Commissioners' Courts must be strictly complied with even when the parties are not legally represented. It would have been so simple to have called the Clerk in charge of the register to produce it or to have asked the parties if they agreed to it being put in as evidence.

But it does not follow that an irregularity must inevitably be followed by the granting of an appeal. It is clear that even without the written record the plaintiff had established his case so the appeal cannot succeed.

It is ordered that the appeal be and it is hereby dismissed with costs.

The Court observes that the Chief's reasons for judgment were furnished in the Zulu language—there is nothing wrong with this—but a translation of those reasons should have been made and filed for the use of the Native Commissioner and copies of such translation should have been made for this Court. This practice should be followed in future.

For Appellant: Mr. H. L. Myburgh.

For Respondent: In person.

SOUTHERN NATIVE APPEAL COURT.

PUNZANA *v.* GONTSHI.

N.A.C. CASE No. 28 OF 1956.

PORT ST. JOHNS: 3rd October, 1956. Before Balk, President, Warner and Olivier, Members of the Court.

Vindicatory action—Negligence of owner as defence.

Summary: Plaintiff unsuccessfully sued defendant for the return of certain property. Defendant did not dispute that the property originally belonged to plaintiff, but alleged purchase from plaintiff's daughter-in-law in whose husband's possession the property had been for some years.

Held: That mere possession by the seller's husband at the time of the purchase did not, standing by itself, establish such negligence on the part of the real owner as to cause the buyer to be misled into the erroneous belief that the possessor had the right to dispose of the property, so that the owner could be estopped from vindicating his property.

Cases referred to:

Dalrymple, Frank and Feinstein *v.* Friedman and Another (2), 1954 (4) S.A. 649 (W.L.D.)

Grosvenor Motors (Potchefstroom), Ltd. *v.* Douglas, 1956 (3) S.A. 420 (A.D.)

Union Government *v.* Landau & Co., 1918 A.D. 108.

Appeal from the Court of the Native Commissioner, Bizana.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent) with costs, in an action in which he was sued by the plaintiff (present appellant) for the delivery of a cupboard and three chairs or payment of their value, viz., £12 for the cupboard and £1. 10s. each for the chairs.

In his particulars of claim the plaintiff averred that—

1. "Plaintiff is the lawful owner of a cupboard and 3 chairs which until the 10th July last were at the kraal of his son Rodgers who is working in Umtata.

2. On the said 10th day of July, 1955, the cupboard and 3 chairs were unlawfully disposed of by Rodgers' wife Mamtembu to the defendant's wife and are presently in the possession of the defendant at the latter's kraal.

3. The said Mamtembu had no lawful right to dispose of the said articles to defendant or to any other person and the plaintiff has never lost his lawful ownership therein.

4. Plaintiff has demanded from defendant the return of the said articles and defendant neglects or refuses to return them.

5. Plaintiff values the cupboard at the sum of £12 and the 3 chairs at 30s. each."

The defendant's plea, as amended with the leave of the Court *a quo*, reads as follows:—

1. "In reply to the allegations in the plaintiff's summons the defendant pleads that his wife purchased a cupboard and three chairs from one Mamtembu *alias* Princess the wife of Rodgers Punzana in April or May last which articles were delivered to the defendant's wife on or about the 10th July, last; that the articles were in the lawful possession of the said Mamtembu at the kraal where she lives with her husband Rodgers and she informed the defendant's wife that the articles were the property of her husband Rodgers and that she (Mamtembu) had authority to sell same.

2. The defendant denies that the plaintiff is the owner of the said cupboard and chairs.

3. The defendant denies that the values placed on the articles are as set out in the summons and says the cupboard is valued at £2. 15s. and the chairs 12s. each.

Wherefore the defendant denies any liability to the plaintiff and prays for judgment with costs."

The appeal is brought on the following grounds:—

"(1) That the judgment is against the evidence, the weight of evidence and probabilities of the case;

(2) That the judgment is bad in law in that—

(*a*) the presiding officer overlooked the legal principle *caveat emptor* (buyer has to beware) and erred in finding that in law plaintiff had lost his ownership over the property purchased;

(*b*) that the women alleged to have entered into the contract of sale are in law incompetent to enter into such a contract, and further defendant failed to discharge the onus which lay on him to call the woman (seller) who is alleged to have effected the sale as the receipt produced might have been written by somebody else.

It is therefore submitted that judgment should have been entered for plaintiff with costs, or alternatively it is respectfully submitted that the Court erred in giving judgment for the defendant and should have, in any event, given judgment of absolution from the instance, in order to allow plaintiff to provide further evidence."

An application for the amendment of these grounds by the insertion of the following additional ground was granted by this Court:—

"2. (*c*) The judgment is bad in law in that in law the plaintiff is entitled to vindicate the goods in question and, on the facts found by the learned Commissioner, is not precluded from doing so by reason of the doctrine of estoppel nor by reason of the fact that he lent the goods to his children for a period of many years."

On the day after the appeal was noted, the defendant, in terms of rule 17 (3) of the rules of this Court, published under Government Notice No. 2887 of 1951, as amended, abandoned the judgment given in his favour by the Court *a quo* and consented to its being altered to one of absolution from the instance, with costs. Effect was given to this abandonment in terms of this Court's Rule 17 (5) and the appeal proceeded only on the main grounds.

In his evidence the defendant intimated that he did not dispute that the cupboard and chairs were originally the plaintiff's property; and neither the defendant's testimony nor that of his wife, who was his only other witness, shows that the plaintiff divested himself of his ownership in these articles; for all their testimony amounts to is that the defendant's wife purchased the articles on his behalf from Rodgers' wife for the sum of £4. 11s. It follows that the evidence of the plaintiff and his wife that the cupboard and chairs were and remained his property, having only been lent by him to his son, Rodgers, has not been controverted nor the plaintiff's testimony that the value of the cupboard is £12 and the chairs £1. 10s. each. Accordingly, there is no substance in the contention of Counsel for respondent that the presumption of ownership arising from Rodgers' possession is here decisive.

The Native Commissioner states in his reasons for judgment that the fact that Rodgers was apparently residing in Umtata coupled wih the assurance by Rodgers' wife that her husband had authorised her to sell the cupboard and chairs gave a strong impression that the plaintiff had no right to them. But in drawing this inference the Native Commissioner misdirected himself for the only evidence that Rodgers authorised his wife to sell the articles in question is that of the defendant's wife who stated that Rodgers' wife had told her that Rodgers had given her permission to sell them and this statement is obviously not probative of Rodgers' having done so as it is hearsay in that respect. The Native Commissioner also states in his reasons for judgment that three factors, viz., the lengthy period during which Rodgers had possession of the cupboard and chairs—over three years—the fact that Rodgers left his home and took up his residence at Umtata where he worked and earned money and the assurance by Rodgers' wife that her husband had authorised her to sell these articles, indicate that the plaintiff had caused the purchaser to be misled and under these circumstances the plaintiff could not succeed. In support of his conclusion the Native Commissioner cited Dalrymple, Frank and Feinstein *v.* Friedman and Another (2), 1954 (4) S.A. 649 (W.L.D.).

But Dalrymple's case is not apposite here as the question decided there is whether ownership passes to an innocent third party where an owner parts with his ownership as a result of fraudulent misrepresentation which renders the transaction voidable only, whereas the point raised by the Native Commissioner here is whether there was *culpa* on the part of the plaintiff which cause the defendant to be misled into the erroneous belief that Rodgers had the right to dispose of the cupboard and chairs so that the plaintiff was estopped from vindicating these articles.

As stated above, the alleged assurance by Rodgers' wife that he had authorised her to sell the cupboard and chairs is hearsay and not probative of his having done so and, as pointed out by Counsel for the appellant, there is nothing in the evidence indicating that the defendant was aware of the fact that the cupboard and chairs had been in Rodgers' possession for a lengthy period when he purchased them. In the circumstances of this case, therefore, the defendant, in seeking to establish that there had been negligence on the part of the plaintiff of the nature indicated above, could rely upon one factor only, viz., that the cupboard and chairs were in Rodgers' possession when he purchased them. This factor alone, however, does not, as contended by Counsel for the appellant, establish such negligence and in any event, the defence of estoppel was neither especially pleaded in the Court *a quo* nor was an amendment of the plea to include such a defence applied for in this Court so that the plaintiff is entitled to succeed in his claim, see Grosvenor Motors (Potchefstroom), Ltd. *v.* Douglas, 1956 (3) S.A. 420 (A.D.) at page 427, and Union Government *v.* Landau & Co., 1918 A.D. 108.

It follows that the abandonment mentioned above does not affect the success of the appeal.

Accordingly the appeal should be allowed, with costs, and the judgment of the Court *a quo* altered to one for plaintiff as prayed, with costs.

H. W. Warner (Permanent Member): I concur.

W. H. Olivier (Member): I concur.

For appellant: Mr. Ntwasa, Bizana.

For respondent: Mr. Birkett, Port St Johns.

SOUTHERN NATIVE APPEAL COURT.

ZUKA *v.* ZUKA.

N.A.C. CASE No. 18 OF 1956.

KOKSTAD: 9th October, 1956. Before Balk, President, Warner and Watling, Members of the Court.

NATIVE CUSTOM—ESTATES.

Presumption of legitimacy obtains in Native Law—Not competent for Native Commissioner's Court to require parties to action to have dispute settled by means of an inquiry under provision of section three (3) *of Government Notice No.* 1664 *of* 1929—*Certificate in terms of section* four *of this Government Notice not a condition precedent to enforcement by him of claim, in connection with immovable property, in favour of Estate devolving according to Native Custom.*

In Native Law the heir becomes sole administrator of estate property on death of deceased.

Summary: Plaintiff, claiming to be the eldest son of the First Hut of the deceased buyer of a farm who had obtained occupation but not transfer of title, sought an order ejecting defendant (now appellant) from that farm, on the ground that he (plaintiff), as the heir to the deceased buyer, had acquired all his late father's rights in the said land, and that defendant was wrongfully and unlawfully occupying the same, and refused to vacate it.

Defendant denied plaintiff's right to succeed to his father on the ground of illegitimacy, and also denied that he had acquired all his late father's rights in the land in question. Defendant further claimed that by his own legitimacy his occupation of the land was lawful.

Judgment having been given in plaintiff's favour the defendant appealed on the grounds, *inter alia,* that (*a*) judgment was against the weight of evidence; (*b*) the Court erred in not allowing the question of heirship to form the subject of an Administrative enquiry; (*c*) the parties having joined issue on the heirship only, it was not competent for the Court to have granted judgment as prayed and that the question of ejectment should have formed the subject matter of a separate trial; and in any case plaintiff could only have instituted action for ejectment after obtaining transfer of the property to himself.

Held: That plaintiff's birth in wedlock gave rise to a presumption of legitimacy for such a presumption obtains not only in common law but also in Native Law.

Held further: That, as it is settled law that the provision of section *three* (3) of the Regulations, published under Government Notice No. 1664 of 1929, as amended, for the holding of an inquiry to determine any dispute or question arising out of the administration or distribution of any estate in accordance with Native Law based, as it is, on sub-sections (4) and (10) of section *twenty-three* of the Native Administration Act, 1927, as amended, does not oust the jurisdiction of a Native Commissioner's Court to determine such a dispute or question, there is no justification, in the absence of statutory provision of that effect, for a Native Commissioner's Court to require the parties to such an action to submit the dispute or question for determination at an inquiry to be held in terms of section *three* (3) of the Regulations mentioned.

Held further: That the language of Section 4 of the said regulations cannot be said to detract from the substantive Native Law that the heir becomes the sole administrator of the estate property immediately on the death of the deceased, or in other words, the heir is then vested with the full control of such property, so that the issue, in terms of this section, of a certificate appointing an administrator was not a condition preceedent to the enforcement by the heir of a claim in favour of the estate in connection with immovable property.

Cases referred to:

Madyibi *v.* Nguva, 1944, N.A.C. (C. & O.), 36.
Moshesh *v.* Moshesh, 1936, N.A.C. (C. & O.), 69.
Dhlamini *v.* Dhlamini, 1938, N.A.C. (T. & N.), 241.
Sigcau *v.* Sigcau, 1941, C.P.D., 71.
Kholane *v.* Manete, 1948, N.A.C. (T. & N.), 24.
Nxumalo *v.* Nxumalo, 1953, N.A.C. 53 (N.E.).
Estate Smith *v.* Estate Follett, 1942, A.D. 364.
Zaduka *v.* Sontsele, 1954, N.A.C. 169 (S.).
Ngcango *v.* Jele, N.O., 1 N.A.C. (N.E.D.), 275.

Statutes referred to:

Government Notice No. 1664 of 1929, as amended, Act No. 38 of 1927, as amended.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sought an order ejecting the defendant (present appellant) from certain land, alternative relief and costs.

In his particulars of claim the plaintiff averred that—

" 1. The parties hereto are Natives as defined in Act No. 38 of 1927.

2. The Plaintiff is the eldest son of the First Hut and heir according to Native Custom of the late Dolopini Zuka who died intestate on the 16th March, 1955.

3. During his lifetime the said late Dolopini Zuka purchased from the South African Native Trust and obtained occupation of a portion of the farm " Flaxton " in the district of Umzimkulu, 11·4338 morgen in extent, which said piece of land is about to be surveyed and transferred to his Estate.

4. Plaintiff, as heir to the said Dolopini, has acquired all his late father's rights in the said land.

5. Defendants are wrongfully and unlawfully occupying the aforesaid land, and despite demand either refuse or neglect to vacate the same."

The defendants pleaded as follows:—

" 1. Defendants admit paragraphs 1 and 3 of the summons.

2. Defendants deny paragraphs 2, 4 and 5 of the summons and pleads that the Plaintiff is not the legitimate son of the late Dolopini Zuka and that they, the plaintiffs (sic) being the legitimate sons of the late Dolopini Zuka are therefore entitled to the property in question and are therefore not in wrongful and unlawful occupation of this property.

Wherefore the defendants pray for judgment in their favour with costs."

Here it should be mentioned that initially this action was brought against two defendants but that, in view of the first defendant's death, it was agreed at the commencement of the

trial in the Court *a quo* that the case should proceed against the second defendant only. The latter's attorney thereupon applied for the case to be postponed so that the question of the heirship could be settled, presumably by means of an inquiry in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended (hereinafter referred to as "the Regulations"). An objection to this application by the plaintiff's attorney was sustained by the Court *a quo* which ruled that the action should proceed and it was accordingly tried to a conclusion.

The appeal is brought on the following grounds:—

"A. The judgment is against the weight of evidence for the undermentioned reasons:—

(i) The evidence of the only witness who could give primary evidence on the question of respondent's paternity, namely witness Mamrabula, was unreliable and should have been rejected "in toto".

(ii) The evidence of the other witnesses called on behalf of respondent was vague and contradictory and did not corroborate the evidence of the said Mamrabula in any respect.

(iii) The Honourable Court erred in attaching weight to the evidence adduced that there had been no public disinherison of respondent. Such action would have been unnecessary where respondent was in fact illegitimate as he would in any case not have been entitled to succeed as heir to Dolopini's estate under Native Law and Custom.

(iv) The evidence for appellant was not seriously attacked in cross-examination and the Court erred in rejecting such evidence altogether, relying presumably entirely on the fact that the witness Makwalukwalu could not remember the name of the month during which she and the late Dolopini transferred to farm "Flaxton".

Moreover the court should have taken cognizance of the fact that appellant's evidence was corroborated in several important respects by the evidence given on behalf of respondent.

B. The Court erred in rejecting appellant's application for the question of the heirship to form the subject of an administrative enquiry. The sisters of respondent and their husbands are interested persons and were not parties to the proceedings.

C. (i) The parties joined issue on the question of heirship only and the court had only to decide who the heir to the estate of the late Dolopini is. It was therefore not competent for the Court to have granted judgment as prayed in the summons and the claim for ejectment should have formed the subject-matter of a separate trial.

(ii) In the premises respondent could only have instituted action for ejectment after having received registration of transfer of the relative immovable property into his own name as the relative estate at present vests in the executor, who is the only competent person to represent such estate at this stage.

D. The judgment as given is defective in that it refers to the ejectment of the person of appellant only and makes no reference to ejectment of appellant's dependants and property."

It is common cause that the late Dolopini Zuka had two wives according to Native Custom and that the plaintiff is the eldest son of Dolopini's first wife born to her during the subsistence of her customary union with Dolopini and during the latter's lifetime. It is also not disputed that the defendant is Dolopini's son by his second wife and the heir in her house.

As contended by Counsel for respondent and conceded by Counsel for appellant, the plaintiff's birth in wedlock gave rise to a presumption of legitimacy for such a presumption obtains not only in Common Law but also in Native Law, see Madyibi *v.* Nguva, 1944, N.A.C. (C. & O.), 36, at page 39, and the onus of rebutting this presumption rested on the defendant.

Turning to the evidence to determine whether or not the presumption of the plaintiff's legitimacy has been rebutted, his mother, Mamrabula, stated in her evidence for him that he was her son by Dolopini. She admitted in cross-examination that she had had one child by a man other than Dolopini but stated that this had been her youngest child. She gave the order of birth of her children as, first the plaintiff, then four daughters, then a son, Zipatu, who died, and then the illegitimate child, which also died. She denied that Dolopini had worked in Johannesburg or had ever been away for long from his home.

It seems to me that Mamrabula cannot be regarded as a reliable witness as her evidence that the plaintiff was her eldest child and that Dolopini had never worked at Johannesburg or been away from home for any length of time, is at variance with that given for the plaintiff by Matyanga Zuka, a senior member of Dolopini's family, who bore out the testimony given for the defendant by his mother that Dolopini had been away at work at Johannesburg for a lengthy period and that the plaintiff was Mamrabula's fifth child born to her after her four daughters.

There is a discrepancy between the evidence of the two remaining witnesses for plaintiff, Jacob Zuka and Ruben Zuka, as to whether Mamrabula was driven away from Dolopini's kraal following her adultery. Jacob stated that she had not been driven away whereas Ruben stated that she had, thus bearing out the defendant's mother in this respect. There is also a discrepancy between Jacob's evidence and that of the plaintiff as to whether Mamrabula had visited Dolopini after the latter had removed to Flaxton. Jacob stated that she had visited Dolopini there whereas the plaintiff stated that she had not done so.

The defendant's evidence regarding the plaintiff's alleged illegitimacy is hearsay and thus of no probative value.

The only other witness for the defendant was his mother whose evidence in regard to the plaintiff's alleged illegitimacy reads as follows:—

> "Dolopini left for Johannesburg for work. Tanana (his youngest daughter by Mamrabula) was then still breast fed. I stayed on at Dolopini's kraal when he left. Mamrabula left for her people's kraal a few months after Dolopini left. Dolopini stayed away for 17 months. When he returned, Mamrabula was still at her people's kraal, but she returned soon after. She was pregnant when she returned. She gave birth to the child about 6 months after Dolopini's return. This child was plaintiff."

As is apparent from what has been stated above, Mamrabula, in her evidence, seems to have tried to hide the fact that the plaintiff was her fifth child and that Dolopini had been away at work in Johannesburg for a lengthy period. This factor coupled with Mamrabula's admission that she had had an illegitimate child undoubtedly, as contended by Counsel for appellant, lends colour to the testimony of the defendant's mother that the plaintiff was that child.

On the other hand, there appears to be no good reason for disbelieving the evidence given for the plaintiff by Matyanga and Ruben. Both these witnesses are senior members of the late Dolopini's family and are related to the plaintiff and the defendant in equal degree, Matyanga being the late Dolopini's half-brother and Ruben his full brother. No material inconsistency or improbability in their evidence is discernable and the defendant and his mother advanced no good reason nor does any such reason suggest itself why they should have borne false witness against the defendant. And from their evidence it is clear that the plaintiff had already been born when Dolopini left for work at Johannesburg which postulates that the plaintiff is Dolopini's legitimate son. Moreover it emerges from their evidence that Dolopini accepted the plaintiff as the heir of his Great House. It is true that Matyanga stated in cross-examination that he was not very sure that the plaintiff had already been born when Dolopini left for work at Johannesburg but in re-examination he said that he was sure that the plaintiff had then already been born as the plaintiff was the same age as his son, Matana, who had already been born at that time.

Counsel for appellant submitted that, in addition to the discrepancies in the evidence for the plaintiff referred to above, the undisputed fact that the plaintiff lived with his mother, Mamrabula, after she had parted from her husband, Dolopini, indicated that the plaintiff was illegitimate. But this argument loses much of its force in the light of the plaintiff's testimony that he had been married for many years and that Mamrabula lived with him at his kraal. That the plaintiff had his own kraal also emerges from the defendant's evidence. Moreover the defendant's mother admitted in cross-examination that Dolopini used to meet the plaintiff when he (Dolopini) went to Kokstad in connection with the land, thus indicating that Dolopini regarded the plaintiff as his legitimate son.

In these circumstances, it seems to me that there is no good reason for preferring the evidence of the defendant's mother to that of Matyanga and Ruben so that the defendant, on whom the onus of proof in this respect rested, cannot be said to have established on a balance of probability that the plaintiff is illegitimate.

It follows that the presumption of legitimacy has not been rebutted and that the Court *a quo* cannot be said to be wrong in its finding that the plaintiff is the late Dolopini's legitimate son and, as such, the heir of his Great House.

Here it should be mentioned that, apart from the fact that no mention of disinherison is made in the pleadings, it is clear from Matyanga's and Ruben's evidence that the plaintiff was not disinherited and this evidence is obviously not controverted by the defendant's testimony that Dolopini had stated to him and his sister that he had "written off" Mamrabula and her children which is the only evidence for the defendant in this connection.

The first ground of appeal, therefore, fails.

Turning to the second ground of appeal, it is, as pointed out by Counsel for respondent, settled law that the provision in section 3 (3) of the Regulations for the holding of an inquiry to determine any dispute or question arising out of the administration or distribution of any estate in accordance with Native Law, based, as it is, on sub-sections (4) and (10 of section *twenty-three* of the Native Administration Act,, 1927, as amended, does not oust the jurisdiction of a Native Commissioner's Court to determine such a dispute or question, see Moshesh v. Moshesh, 1936, N.A.C. (C. & O.), 69, Dhlamini *v.* Dhlamini, 1938, N.A.C. (T. & N.), 241, and Sigcau *v.* Sigcau, 1941, C.P.D. 71, so that, in the absence of any statutory provision indicating that a Native Commissioner's Court may require the parties to such an action to submit the dispute or question for determination at an inquiry

to be held in terms of section 3 (3) of the regulations, there appears to be no justification for a Native Commisioner's Court to do so, particularly since, as is clear from the cases cited above, the finding at the inquiry cannot be enforced otherwise than by a civil action. This aspect of the matter does not appear to have been considered in Kholane v. Manete, 1948, N.A.C. (T. & N.), 24, nor in Nxumalo *v.* Nxumalo, 1953, N.A.C. 53 (N.E.), and as there can be no doubt that it forms the overriding consideration, I come to the conclusion, with respect, that these decisions ought not to be followed. Accordingly the Court *a quo* rightly refused the application for the postponement of the case for the question of the heirship to be settled by means of an inquiry in terms of section 3 (3) of the regulations and the second ground of appeal also fails.

Turning to paragraph (i) of the third ground of appeal, it is manifest from the pleadings and evidence that issue was joined by the parties not only on the question of the heirship of the late Dolopini's Great House but also on the question of the ejectment and Counsel for appellant intimated that he was unable to advance any argument in support of this aspect.

In connection with paragraph (ii) of the third ground of appeal, Counsel for appellant pointed out that section 4 of the regulations provided that the transfer of immovable property to or from an estate devolving according to Native Law falls to be effected much in the same way as in the case of the estate of a person other than a Native i.e. by means of the appointment of an administrator in the former case and an executor in the latter. Counsel contended that it followed that in the instant case in which it was clear that the land had not as yet been transferred to the plaintiff from the estate of the late Dolopini—in fact it had not as yet been transferred to this estate from the present registered owner viz. the South African Native Trust—and in which there was no indication of the appointment of an administrator, it was not competent for the plaintiff, solely in his capacity as heir to the estate, to maintain an action for the defendant's ejectment from the land and the Court *a quo* should accordingly have decreed absolution from the instance. In support of this contention Counsel cited Estate Smith *v.* Estate Follett, 1942, A.D. 364, at page 367.

On the other hand Counsel for respondent submitted that in Native Law which applies in the instant case, the property in an estate not only devolves on the heir upon the death of the deceased but the heir at the same time becomes the sole administrator of such property so that the plaintiff had *locus standi* here and in this connection he referred this Court of Zaduka *v.* Sontsele, 1954, N.A.C. 169 (S.).

That case sets out the law as regards movable property but, as the instant case involves a right to immovable property, the provisions of section 4 of the regulations call for consideration in the light of the argument advanced by Counsel for Appellant in this respect.

This question was considered in Ngcango *v.* Jele, N.O. 1 N.A.C. (N.E.D.) 275 and there it was held that the issue in terms of section *four* of the regulations of a certificate appointing an administrator was not a condition precedent to the enforcement by the heir of a claim in favour of the estate in connection with immovable property. With this decision I am, with respect, in agreement; for, as is manifest from the judgment in that case, the language of section 4 of the regulations cannot, on a proper construction thereof, be said to detract from the substantive Native Law that the heir becomes the sole administrator of the estate property immediately on the death of the deceased; or, in other words, the heir is then vested with the full control of such property. That being so and as it is not

disputed that the late Dolopini was given the right of occupation of the land, it was competent for the plaintiff, in his capacity as the heir of the late Dolopini's Great House, to maintain the instant action. The third ground of appeal, therefore, also fails.

There is obviously no substance in the fourth and last ground of appeal as the only point brought into issue both by the pleadings and evidence in so far as the claim for ejectment is concerned, is the ejectment of the defendant only and Counsel for appellant, therefore, rightly abandoned this ground.

In the result, I am of opinion that the appeal should be dismissed, with costs.

H. W. Warner (Permanent Member): I concur.

R. W. H. Watling (Member): I concur.

For Appellant: Mr. Grant, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

MANDEMBU and ANOTHER *v.* CETYWA.

N.A.C. CASE No. 25 OF 1956.

KOKSTAD: 9th October, 1956. Before Balk, President, Warner and Watling, Members of the Court.

PRACTICE AND PROCEDURE.

Irregularity in service cured by party affected proceeding with litigation without objection—Rescission of default judgment—Wilful default. Evidence—Admissibility of secondary evidence of document.

Summary: Application for rescission of a default judgment was dismissed in a Native Commissioner's Court. An appeal was noted on the grounds that the judgment was against the weight of evidence, and that it was bad in law, (*a*) as it was not sufficient for the respondent to prove only that the appellants were aware of the steps to be taken to prevent default judgment being entered; but that it was necessary to prove also that they knew what the consequences of such judgment would be; and (*b*) appellant's decision to ignore the claims was not necessarily wilful default.

First defendant's copy of the summons was handed to the second defendant, but the former no longer resided with the latter. There was nothing to show that it was served at the former's place of business or employment.

Held: That the irregularity in the service of the summons was cured by the affected party proceeding with the litigation without objection.

Held further: As the evidence showed that defendants knew what they were doing, intended what they were doing, were free agents and indifferent to the possible consequences of their default, they were in wilful default.

Held further: That a copy of a letter which is neither a duplicate original, nor an initialled carbon copy, affords only secondary evidence and is inadmissible, in the absence of notice to the opposing party and holder of the original letter to produce such original.

Cases referred to:

Van Rensburg *v.* Van Rensburg, 1929, O.P.D. 61.
Nyati *v.* Mtikana, 1 N.A.C. (S.D.), 188.

Works of reference referred to:

Cases and Statutes on Evidence, H. J. May (Third Edition).
Phipson on Evidence (Ninth Edition).

Statutes referred to:

Government Notice No. 2886 of 1951, as amended.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court dismissing, with costs, application by the two defendants (present appellants) for rescission of the default judgment given against them by that Court in a certain civil action at the instance of the plaintiff (now respondent).

The appeal is brought on the grounds that the judgment is against the weight of the evidence and that it is bad in law in that the Court *a quo* erred—

"(*a*) in finding that it was sufficient for respondent to prove only that appellants were aware of the steps to be taken to prevent default judgment being given against them and disregarding the necessity to prove also that appellants knew what the consequences of judgment by default would be;

(*b*) in concluding that as appellants had decided to ignore the respondent's claims, they were wilfully in default."

The Additional Assistant Native Commissioner *a quo* found that both the defendants had been in wilful default so that in the first instance it is necessary to go into this aspect for, if that finding is correct, then in terms of Rule 74 (5) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended (hereinafter referred to as "the Rules") it was incompetent for the Court *a quo* to grant the applications and the appeal cannot succeed. The appeal was argued by Counsel for both parties on this basis.

The summons in the action appears to have been duly served on the second defendant but it is doubtful whether it was properly served on the first defendant, regard being had to Rule 31 (3) of the Rules; for, according to the return by the Messenger of the Court and the defendants' evidence, both copies of the summons were delivered by the Messenger to the second defendant and the first defendant was at that time no longer residing at the same place as his brother, the second defendant; and there is nothing to show that the place at which the copies of the summons were delivered to the second defendant was the first defendant's place of business or employment at the time. However, as will be apparent from what is said later, in this judgment, it is clear that the summons came to the first defendant's notice before the default judgment against him was entered and, as the first defendant has proceeded with the litigation without taking any objection to the service of the summons on him, it can only be assumed that he has waived any such objection and any irregularity in the service falls to be regarded as cured, see Van Rensburg *v.* Van Rensburg, 1929, O.P.D. 61.

Notice of appearance to defend the action was entered by Attorney Jennings on the 5th January, 1956, and on the 16th February, 1956, the plaintiff's attorneys delivered notice in writing, in terms of Sub-Rule (3) of Rule 41 of the Rules calling upon the defendants to deliver their respective pleas within 48 hours of the receipt of that notice, failing which application would be made, in terms of Sub-Rules (4) and (7) of that Rule,

for judgment as prayed in the summons. The defendants failed to deliver their pleas by the 23rd February, 1956, and on that date the Court *a quo,* after hearing the plaintiff's evidence in regard to the nature and extent of the damages claimed by him, entered judgment by default in his favour as prayed, with costs, against both defendants.

Applications in terms of Rule 74 of the Rules for rescission of that judgment were duly made by both defendants.

It is clear from the evidence given for the plaintiff by attorney Jennings and his interpreter, Dlamini, at the hearing of the applications, that on the 20th February, 1956, attorney Jennings received the notice in terms of Rule 41 (3) referred to above and that on that day the first defendant called at his office and stated that he did not want to be legally represented and that he was thereupon advised by attorney Jennings through Dlamini to go to the Clerk of the Court concerned and file his plea before the 22nd February, 1956, otherwise judgment would be given against him. In his evidence the first defendant denied that he had been so advised. The Additional Assistant Native Commissioner, however, accepted the evidence for the plaintiff in this respect and, to my mind, there can be no doubt that he was entitled to do so for, as pointed out by him in his reasons for judgment and as stressed by Counsel for respondent, the first defendant cannot be regarded as a reliable witness in that in his affidavit filed in support of the application for rescission of the default judgment against him, he stated that he had been unaware of the summons in the action until his brother, the second defendant, had notified him in March, 1956, that his cattle had been attached by the Messenger of the Court in connection therewith, whereas in his oral evidence he admitted that he had known of the action long before his cattle had been attached and that he had told Dlamini on the 20th February, 1956, that he did not want to be legally represented in the action. Again, the first defendant was unable to give any reason why attorney Jennings and Dlamini should bear false testimony against him.

The first defendant, apart from the obviously false explanation in his supporting affidavit that he was unaware of the summons in the action before his cattle were attached, gave no reason as to why he took no steps to defend the action before the default judgment was given against him and, as is clear from what has been stated above, the summons had come to his notice and its implications had been explained to him before the default judgment was entered against him.

Applying the test laid down in Nyati *v.* Mtikana, 1 N.A.C. (S.D.) 188, at page 189, to these circumstances, the conclusion that the first defendant was in wilful default appears to me to be inescapable for it is manifest that in failing to take any steps to defend the action before the default judgment was given against him, he knew what he was doing, intended what he was doing, was a free agent and was indifferent as to what the consequence of his default may be.

Turning to the second defendant's application, it is manifest from the evidence of attorney Jennings and Dlamini that on the 5th January, 1956, the second defendant paid £1 to the former who, on the instructions of the second defendant, then entered an appearance on behalf of both defendants to defend the action; and the second defendant, in the course of his oral evidence, admitted that the summons had been explained to him by the Messenger of the Court, that he knew that he had to defend the action, that he had been told at attorney Jennings' office that the latter's fee for undertaking the defence was £9, that he had in fact only paid £1 in all to attorney Jennings, that he was aware that if he did not pay the full fee to attorney Jennings the latter would not proceed with the defence of the action,

that he knew that it was necessary to deny the allegations in the summons and that he had made a mistake in not going to the Native Commissioner to do so. The second defendant also admitted that he knew what a default judgment was. His explanation for his failure to take the necessary steps to defend the action, viz. that contained in his supporting affidavit, is that he went to his attorney and entered an appearance to defend the action on the 5th January, 1956, and that he had heard nothing further until the 8th March, 1956, when the Messenger of the Court had attached his cattle. In his evidence-in-chief at the hearing of the applications he re-iterated that he went to his attorney to enter an appearance to defend the action but added that he had paid him £1 of the total fee of £9, that he had told the attorney that he was not going to pay the £9 as he had not ploughed the lands as alleged in the summons, that when he left attorney Jennings' office on the 5th January, 1956, he thought the matter was settled and that he only became aware that the action had been proceeded with when the Messenger of the Court attached his cattle. In cross-examination, however, he admitted that he knew that attorney Jennings would not proceed with the defence as he had not paid the whole of the latter's fee and added:—

> "I decided to sit down because I am innocent, and did not want to enter an appearance to defend. I went to Mr. Jennings because my father used to employ him."

Apart from the fact that the second defendant's initial explanation, i.e. that contained in his supporting affidavit, is misleading in that he makes no mention of the fact that he had not paid his attorney in full to defend the action and was aware of the fact that his attorney would not, therefore, proceed with the defence, that explanation is obviously inconsistent with the one advanced by him in his oral evidence that he took no steps to defend the action as he was innocent of the alleged wrong against the plaintiff and that he did not want to enter an appearance to defend the action and had only gone to attorney Jennings because his father used to employ him.

It follows that the second defendant gave no acceptable explanation of his failure to take the necessary steps to defend the action before the default judgment against him was entered and that, applying the test referred to above to his attitude in the matter as disclosed by the evidence, it seems clear that he was in wilful default.

A further point calls for comment and that is the copy of the letter (Exhibit "A") put in by attorney Jennings at the hearing of the applications. This letter was addressed by this attorney to the defendants on the 27th January, 1956, and reads as follows:—

> "As we have heard nothing further from you in the above matter we have to-day written to the plaintiff's attorneys, Messrs. Zietsman & Eagle of Kokstad advising them that it is our intention to withdraw from the case unless you pay the amount which we quoted you and instruct us for plea before the 3rd proximo.
>
> Your plea to the summons should have been filed by the 13th instant and as it has not been you run the risk of judgment in default of plea being taken against you at any time."

The Additional Assistant Native Commissioner does not appear to have relied on this document and, to my mind, rightly so, as will be apparent from what follows. The copy of the letter is not a duplicate original or a carbon copy initialled by attorney Jennings but apparently a copy typed for the purpose of being put in at the hearing of the applications so that it only afforded secondary evidence, see paragraph 117 of May on Evidence (Third Edition). That being so and, as there is nothing to indicate that notice was given to the defendants to produce the original

letter at the hearing of the applications, the copy was inadmissible. It is true that the second defendant denied in his oral evidence that he had received the letter. But it seems to me that this denial does not cure the absence of notice to the defendants to produce the original letter as the rule allowing of the admission of secondary evidence of a document is contingent upon all reasonable means having been taken by the party desiring to put in the document as evidence to procure the original thereof *before* putting the document in, see Phipson on Evidence (Ninth Edition) at pages 568 and 569.

In the result I am of the opinion that the appeal by both the appellants should be dismissed, with costs

H. W. Warner (Permanent Member): I concur.

R. H. W. Watling (Member): I concur.

For Appellants: Mr. Grant, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

NORTH-EASTERN NATIVE APPEAL COURT.

PUNGULA *v.* **SITHOLE.**

N.A.C. CASE No. 52/56.

PIETERMARITZBURG: 15th October, 1956. Before Steenkamp, President, Ashton and Bridle, Members of the Court.

DEFAMATION.

"Privilege"—Person in authority.

Summary: Plaintiff sued defendant for damages for defamation contained in a statement that "You gave Philpina some sweets through the hands of your children and she ate them. You gave Philpina cakes which had medicine in them and she ate them. You dragged Philpina twice to a bush to Madonda who seduced her."

Defendant denied uttering the words and although the defence of "privilege" was not pleaded in the trial court, sought to take that defence in the appeal.

Held:

(1) Defamation as described in the Natal Code of Native Law is "every malicious statement alleging evil conduct on the part of any person."

(2) That a statement that a woman caused a girl to go to a bush for a man to know the girl carnally is an imputation of evil conduct and consequently defamatory.

(3) The defence that words were uttered on a privileged occasion cannot be taken for the first time on appeal.

(4) That who is a "person in authority" is dependent entirely on the question whether the person has a duty or interest to receive a report from a person having a duty or interest in making it. This would in certain circumstances include a kraal head.

Statutes, etc., referred to:

Section 132 of Natal Code of Native Law (Proclamation No. 168 of 1932).

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President), delivering the judgment of the Court:—

Plaintiff sued defendant for £10 damages for defamation alleging that defendant said of plaintiff in the presence of others "You gave Philpina some sweets through the hands of your children and she ate them. You gave Philpina cakes which had medicine in them and she ate them. You dragged Philpina twice to a bush to Madonda who seduced her."

The Native Commissioner having heard lengthy evidence for both parties gave judgment for plaintiff for £5 and costs and against that judgment defendant has appealed to this Court on the following grounds:—

"1. The words complained of are not defamatory *per se*.

2. It was not proved that the defendant uttered the words complained of.

3. If it be held that defendant uttered the words then they are not actionable because they were in the nature of a report addressed to plaintiff's husband, a man in authority, and were uttered in good faith and without express malice."

Section No. 132 of the Natal Code of Native Law includes in the definition of defamation "every malicious statement alleging evil conduct on the part of any person." It can hardly be seriously contested that an allegation that a woman caused a girl to go to a bush for a man to know the girl carnally is not an imputation of evil conduct and the first ground must fail.

There is no substance in ground 2 of the appeal. The Native Commissioner found it proved that defendant addressed the words complained of to plaintiff and he was right in his finding on the evidence before him. The evidence was overwhelming.

In his plea in the Native Commissioner's Court defendant denied uttering the words but did not plead that if they were found to have been uttered they were spoken on a privileged occasion. Such being the case this defence cannot be brought for the first time on appeal and it is this defence that appellant's Counsel mainly relied on for the success of his appeal.

The result is that all the grounds of appeal fail and it is accordingly dismissed with costs.

Counsel for appellant asked this Court to give a ruling as to whether in "a plea of privilege" a kraal head would be regarded as "a person in authority". Such a ruling is not called for in the case on appeal but Mr. Bulcock's attention is invited to the law on the subject which is that any person who has a duty or interest to make a report may do so to any person who has a corresponding duty or interest to receive it. This would in certain circumstances include a kraal head.

For Appellant: Mr. H. L. Bulcock.

For Respondent: Adv. J. A. van Heerden, instructed by C. C. C. Paulstone & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

VEZI *v.* CHIEF MKIZE and 2 OTHERS.

N.A.C. CASE No. 63/56.

PIETERMARITZBURG: 16th October, 1956. Before Steenkamp, President, Ashton and Bridle, Members of the Court.

PRACTICE AND PROCEDURE.

Time within which appeal may be noted when written judgment requested.

Summary: The subject matter of this action is not material to this report. The Native Commissioner was requested in terms of Native Appeal Court Rule 2 (1) to furnish a written judgment. He complied on the 14th July, 1956, and appeal was noted on the 1st August, 1956, a day late. The Native Commissioner after hearing the case was transferred to another station and although he dated his written judgment 14th July, 1956, it was not possible for it to be delivered on that day to the Clerk of the Court where the case was heard.

Held: As the Officer who delivered the judgment could not have effected *delivery* on the day he signed the written judgment and as it would have taken more than one day for the *delivery* of the written judgment and as the notice of appeal would have been only one day late if the period had been calculated from the date of signing the written judgment the appeal must be held to have been noted within the time allowed by the rules.

Appeal from the Court of the Native Commissioner, Ixopo.

Ashton (Permanent Member), delivering the judgment of the Court:—

Before entertaining the appeal in this case it was necessary to consider an application for the condonation of its late noting.

The Native Commissioner was called upon in terms of the Native Appeal Court Rule No. 2 (1) to furnish a written judgment. He did so on the 14th July, 1956. The appeal was lodged on the 1st August, 1956—one day over the fourteen days after the date the written judgment was signed.

But the Native Commissioner who presided at the trial had been transferred to a new station and it was impossible for the written judgment to have been *delivered* to the Clerk of the Court at his old station if the ordinary means of communication were taken. Rule 4 of the Rules for Native Appeal Courts provides that the fourteen days allowed within which to appeal shall commence after the *delivery* of the written judgment to the Clerk of the said Court by the officer who delivered the judgment and it is clear that allowance must be made for the delivery to be effected if, as in this case, the officer who delivered the judgment could not have effected delivery on the day he signed the written judgment. In this case it would have taken more than just one day for the delivery of the written judgment and as the noting of the appeal would have been only one day late if time were calculated from the signing of the written judgment it must be held to have been noted within the time allowed by the rules.

In view of this decision it must be emphasised that Clerks of Court must indicate on written judgments furnished in terms of sub-rule (1) of Rule 2 of the Rules for Native Appeal Courts the date on which they are delivered to them. This was not done in this case.

This case arises out of an attachment of four head of cattle in pursuance of a judgment obtained by third defendant against Mfinyezi Vezi, the brother of plaintiff. Plaintiff claimed the cattle as his and sued the Chief (first defendant) his Messenger (second defendant) and the judgment creditor (third defendant) for the return of the cattle attached.

It is not disputed that there was a valid judgment in favour of third defendant against Mfinyezi the head of the kraal of which plaintiff had been an inmate and it is abundantly clear that the onus of proving that the attached cattle were his own fell upon the plaintiff.

His story was that he had been given an *ngqutu* beast of one of Mfinyezi's sisters by her mother, that Mfinyezi had used the beast and its offspring and had then pointed out another girl Esiyu from whose *lobolo* plaintiff was to be repaid.

Now the first transaction was quite irregular as the supposed gift was made when the mother was not in a position to make it and she actually died before her daughter married so the gift was doubly invalid. In fact the whole story put forward by plaintiff and his witnesses was difficult to believe and was probably nothing more than a concoction to avoid the payment of Mfinyezi's debt to third defendant.

The Native Commissioner found for the defendants on the facts and nothing has been shown to indicate that he was manifestly wrong in his findings.

The appeal is accordingly dismissed with costs.

For Appellant: Adv. Mitchell instructed by R. I. Arenstein & Fehler.

For Respondent: Mr. H. L. Bulcock.

NORTH-EASTERN NATIVE APPEAL COURT.

MBOKAZI *v.* **MTETWA.**

N.A.C. CASE No. 54 OF 1956.

ESHOWE· 24th October, 1956. Before Steenkamp, President, Ashton and Alfers, Members of the Court.

PRACTICE AND PROCEDURE.

Default judgment—Rescission—Expression of opinion before judgment.

Summary: Plaintiff claimed certain cattle from defendant and the case was postponed at the latter's request. On the day to which the hearing was postponed defendant did not appear until some time after a default judgment was entered against him. Defendant had telephoned that owing to the non-running of his bus he would be late. In an application for the rescission of the default judgment the Assistant Native Commissioner found the default wilful and expressed his opinion that defendant had failed to indicate that he had the slightest chance of success in the action against him.

Held: (1) The Assistant Native Commissioner was manifestly wrong in deciding that it was proved that applicant was in wilful default because all the evidence before him was to the opposite effect.

Held: (2) He was also wrong in expressing the opinion that applicant, defendant, had no hope of success in the main case as he had postponed the case for the very purpose of allowing defendant to bring a further material witness.

Held: (3) The proceedings in the Native Commissiener's Court are set aside and the case is referred back to be heard *de novo* by another judicial officer on the same pleadings.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff claimed from defendant three head of cattle and their incerase which he said were unlawfully taken in execution of a judgment to which plaintiff was not a party. Defendant pleaded that he was not indebted and that a previous claim was brought against him by plaintiff and judgment was given in his favour.

At the commencement of the proceedings it was ascertained that the previous summons had been dismissed and the trial proceeded. Evidence was heard by the Assistant Native Commissioner who at defendant's request postponed the hearing until the 4th May, 1956, to enable him to call another witness. On that date plaintiff appeared but defendant did not when the case was called and the Assistant Native Commissioner thereupon gave judgment for plaintiff for three head of cattle plus their three increas and costs.

On the 26th May, 1956, an application was made for the rescission of the default judgment granted on the 4th *item.* It appears that the defendant and his witness actually arrived at the Court House at 2 p.m. on that date—an hour and a quarter after the default judgment had been delivered and that efforts to telephone the Court about their probable late arrival, due to the bus not running, had been made.

The Assistant Native Commissioner refused the application for the rescission of the default judgment with costs and an appeal against that decision is now made to this Court on the ground that "the Native Commissioner's judgment is against the evidence and weight of evidence adduced by plaintiff's witnesses."

The Assistant Native Commissioner was manifestly wrong in deciding that it was proved that applicant was in wilful default because all the evidence before him was to the opposite effect. He was also wrong in expressing the opinion that applicant, defendant, had no hope of success in the main case as he had postponed the case for the very purpose of allowing defendant to bring a further material witness and he had no idea what his evidence would be.

In the circumstances the appeal is allowed with costs; the proceedings in the Native Commissioner's Court are set aside and the case is referred back to the Native Commissioner's Court to be heard *de novo* by another judicial officer on the same pleadings.

Costs in the lower Court to be costs in the cause.

For Appellant: Mr. H. H. Kent.

For Respondent: Mr. M. M. Schreiber.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOMBELA *v.* NTOMBELA.

N.A.C. CASE No. 55 OF 1956.

ESHOWE: 25th October, 1956. Before Steenkamp, President, Ashton and Alfers, Members of the Court.

ZULU LAW AND CUSTOM.

Ranking of wives taken by a commoner.

Summary: The father of two sons the parties to this case, married four wives, the first of whom died without issue shortly after her marriage. He then married a second wife who bore him eight children including plaintiff; thereafter he married a third wife who bore him defendant; a fourth wife was married but she does not affect the issue. The father died without having made any division of his kraal into sections or without having declared the status of any of his wives. Plaintiff, the eldest son of the second married wife claimed to be his father's heir and defendant the eldest son of the third married wife claimed that he was the heir. The unions all took place when the Zululand Code of 1878 was in force and the case depended for its decision on section 26.

Held: (1) That where a kraalhead has not conferred status or rank on his wives at the time of the celebration of the various unions or later or where cattle have not been taken from a senior house to establish a junior house or where he has not divided his kraal into sections there can be no question of the automatic acquisition of status of the various wives married (except the first wife) but that the wives rank in strict order of the marriage.

Held: (2) That the word "presumably" in section 26 of the Zululand Code of 1878 cannot be interpreted as "automatically".

Cases referred to:

Ugijima *v.* Mapumane, 1911, N.H.C. 3.
Dhlamini *v.* Dhlamini, 1938, N.A.C. (N. & T.) 241.
Dhlamini *v.* Dhlamini, 1939, N.A.C. (N. & T.) 95.
Sepani *v.* Mgitshwa, 1904, N.H.C. 118.

Statutes, etc, referred to:

Section 26 Natal Code of Native Law, 1878.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Alfers (Member), delivering the judgment of the Court:—

Plaintiff sued defendant in the Chief's Court for a declaration that he (plaintiff) is the heir to the late father of the parties, one Maklwana Ntombela, alleging that his (plaintiff's) mother, Nozinya, was the chief wife of their deceased father. Defendant pleaded that his mother, Mcefe, was the *nkosikazi*. The Chief's judgment is not clear but he amplified it in his reasons for judgment to the effect that plaintiff is the rightful heir to his late father.

Defendant was not satisfied and appealed to the Court of the Native Commissioner and amplified his defence by stating that his mother was affiliated to the *indhlunkulu*.

The salient facts of the case as found proved by the Native Commissioner in his reasons for judgment are not in dispute. The father of the parties, the late Maklwana, married four wives. The first wife died shortly after marriage leaving no issue. He then married Nozinya by whom he had eight children of which plaintiff was the eldest. After Nozinya had borne Maklwana eight children, he married Mcefe, the mother of defendant. He subsequently married a fourth wife. Plaintiff carried his father's gun at the funeral but it must be borne in mind that defendant was absent at work at the time of the funeral. It should be observed here that the evidence does not disclose that the deceased conferred status or rank upon any of the wives by making a public declaration at the time of the celebration of the various unions or later, neither is there any evidence that *lobolo* for the second, third or fourth wives was obtained from the *indhlunkulu,* nor that the deceased divided his kraals into sections.

The Native Commissioner dismissed the appeal with costs and against this judgment defendant appeals on the grounds that the Native Commissioner erred in granting judgment for plaintiff in that the evidence and the weight of evidence substantiated defendant's claim and did not support plaintiff.

All the marriages took place before 1918 so that recourse must be had to the Code of 1878 which, by virtue of the decision of Ugijima versus Mapumane (1911, N.H.C. at page 3), was in force in Zululand at that time, to determine the matter.

The question centres around the interpretation of section 26 of the 1878 Code. This section reads:—

> "The wife secondly married is presumably the first wife on the left-hand side, and the wife thirtly married is in like manner the first wife on the right-hand side. Generally the head of the kraal declares his will on these points at the time of the marriage. When for any marriage of the kraal-head cattle are taken from a house on either side of the kraal, the new wife belongs to that side."

Counsel for appellant contended that this section means that in the absence of any declaration by the kraalhead at the time of the marriage, then the houses automatically rank as the *Indhlunkulu, Ikohlo, Iqadi,* etc., in order of the dates of marriage and stated that the word "presumably" in section 26 quoted above means "automatically"—in other words, until the contrary is proved automatic ranking is assumed. He relies for this interpretation on a passage from the case of Dhlamini *v.* Dhlamini, 1938, N.A.C. N.T. page 241 at page 243 where McLoughlin, President, said:—

> "Under the old Code as under Native Custom, the head of a kraal could nominate the status of his wives during his lifetime. If there was no nomination or division of the kraal, then the wives took the position set out in Section 26 in the normal course of events. Bevu *v.* Laduma, 1900, N.H.C., page 22 shows one variation and the word "presumably" in the section presupposes other variations of the normal rule. In the light of the old Code then it rests with plaintiff to show how he came to be appointed general heir."

The reliance of Counsel on this decision of McLoughlin, President, has not the force of a decided case as it was merely an expression of the then President's opinion of the interpretation of the section and later in his judgment it will be seen that there was a divergence of opinion among the members of the Court on this point.

But, this very point was again dealt with in the same case of Dhlamini *v.* Dhlamini, 1939, N.A.C. (N.T.) at page 95 and here it must be stated that this was a unanimous judgment.

Braatvedt, P. said in this case at page 100:—

"It (the declaration of an *ikohlo* wife) is, however, without a doubt, not a practise which is observed by every commoner. There are many kraals where no such appointments are made either during the husband's lifetime or after his death."

He also quoted wtih approval the decision of Sepani *v.* Mgitshwa, 1904, N.H.C., page 118 (Zululand case) where it was held that the son of a younger house cannot be selected as heir to the Chief house before the son of an older house, unless the younger house had been specially and publicly affiliated at the time of marriage, to the Chief house. In the present case there is no evidence of any declaration that the house of defendant's mother was affiliated to the *indhlunkulu* and therefore the submission by Counsel for appellant (defendant) that the third house is automatically affiliated to the first house, falls away.

In the case of Dhlamini *supra* Braatvedt, P., went on say (page 101):—

". . . . . for if Section 26 is construed to mean that the *ikohlo* and *iqadi* sections are automatically established, then as already pointed out, practically all commoners with several wives would have kraals divided into sections and we know that such is not the case."

At page 103 he states:—

"Under the new Code also I can find no authority for departing from the well-established decisions of the Court's that the law of primogeniture must be observed where a husband has not divided his kraal into sections."

At page 105 of this case, Campbell, Member stated:—

"It is true that section 26 of the Code of 1878, describes the second wife taken in marriage as „presumably the *ikohlo*" but I cannot read into the section any authority for the contention that the second wife automatically becomes the *ikohlo*. The division of a man's kraal into sections not only entails the ranking of the wives in those sections but presupposes the creation of distinct and separate estates commensurate in number with the sections or divisions created. It follows that before there can be a true division of a kraal into various sections in the strict sense of the word, the intention to bring about such a division must be manifested by some clear action on the part of the husband. It is true that the second wife taken in marriage is somewhat loosely referred to as the *ikohlo* but the number of decisions extending over a number of years indicate that the second wife is not automatically the *ikohlo*."

The decision in the case of Dhlamini v. Dhlamini, 1939, N.A.C. (N.T.), page 95, was unanimous, it has been followed by this Court before and in our opinion it sets out correctly the interpretation of Section 26 of the Code of 1878. This being so, the *stare decisis* rule that subordinate Courts cannot depart from what has been laid down by a superior Court must be followed.

This Court wishes to lay down, following the decision of Dhlamini *supra* that where a kraalhead has not conferred status or rank on his wives at the time of the celebration of the various unions or later, or where cattle have not been taken from a senior house to establish a junior house or where he has not divided his kraal into sections, there can be no question of the automatic acquisition of status of the various wives married (except the first wife), but that the wives rank in strict order of date of marriage. It follows therefore that plaintiff as the eldest son of the second wife married is the general heir to the estate of his late father as the first wife died without issue.

The appeal is accordingly dismissed with costs but the Native Commissioner's judgment is not clear and it is altered to read: "The appeal from the Chief's Court is dismissed with costs but his judgment is amplified to read: Plaintiff is declared general heir to his late father. Defendant to pay the costs."

For Appellant: Mr. H. H. Kent.

For Respondent: Mr. M. M. Schreiber.

NORTH-EASTERN NATIVE APPEAL COURT.

MPUNGOSE *v.* SHANDU.

N.A.C. CASE No. 61 OF 1956.

DURBAN: 31st October, 1956. Before Steenkamp, President, Ashton and Ahrens, Members of the Court.

ZULU LAW AND CUSTOM.

Rights of women to property—Milk beast—Costs.

Summary: Plaintiff, a Native woman sued defendant for certain cattle which she claimed as her property. Her claim was based on her rights to a beast which she said was given to her by her father-in-law for milk purposes shortly after her marriage.

Held (1): In view of the provisions of Section No. 27 (2) of the Natal Code of Native Law the only property a woman may own is an *ngqutu* beast and such personal things as wearing apparel. All her earnings and anything accruing to her by gift or otherwise belong to the house to which she belongs.

Held (2): That the statement contained on page 60 of Stafford and Franklin's Principles of Native Law and the Natal Native Code that a woman had the right to dispose of the *mumba* beast which a son-in-law gave her must be qualified by the words "subject to the control of her husband".

Held (3): That as the point on which the appeal was allowed was not raised by appellant in his grounds of appeal and the Court raised it *suo motu* appellant should be deprived of his costs of appeal.

Cases referred to:

Mkunzi *v.* Fred Nyawose, N.H.C. 1916 (pt. 1), 47.

Appeal from the Court of the Native Commissioner, Durban.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff, a Native female, assisted by her guardian, sued defendant in the Court of the Native Commissioner, Durban, for eight head of cattle (or their value £140) which she averred were in defendant's possession. Defendant in his plea denind that the plaintiff was the owner of the cattle and the Additional Native Commissioner after hearing evidence for both parties gave judgment for plaintiff as prayed.

Defendant has brought that judgment in appeal to this Court on the ground that it was bad in law and against the weight of evidence but as the statement that it was bad in law has not been implemented to show in what respect it was bad the appeal can only be taken to be based on the ground that it was against the evidence. An attempt was made to amend the grounds of appeal but as the application did not comply with the Rules it was rejected.

The Additional Native Commissioner correctly decided the case according to Native Law and immediately the question arises whether the plaintiff's claim to be the owner of the cattle in dispute is supportable.

Plaintiff in her evidence described herself as a widow and related how, a year after her marriage, her father-in-law gave her a black heifer with a white tail to provide her with milk and she made the statement that under Native Law and Custom the heifer and its progeny belong to her. She then proceeded to describe the progeny of the heifer and certain transactions by which the animals in dispute came to be in defendant's possession. From all of which it is clear that plaintiff's claim is based on her statement of Native Law that the heifer given to her by her father-in-law to provide milk and its progeny became her property.

The Additional Native Commissioner in his reasons for judgment found it proved that the heifer and its progeny belonged to plaintiff but nowhere does he quote any authority for such a finding.

Section No. 27 (2) of the Natal Code of Native Law enacts that a Native woman is a perpetual minor in law and has no independent powers save as to her own person and as specially provided in the Code. As a result the only property a woman may own is an *ngqutu* beast and such personal things as wearing apparel. All her earnings and anything accruing to her by gift or otherwise belong to the house to which she belongs. The heifer which was given to her by her father-in-law belonged to her house and not to her and the heir of her house was the rightful person to institute any action regarding it. It would seem that Harold Shandu (who assisted plaintiff in the action) is the house heir and that litigation between him and the defendant has already taken place as a result of which defendant took possession of the animals in dispute.

After hearing Counsel for respondent and appellant on the appeal as it stood the Court of its own motion called upon them to argue the legal position of the plaintiff in relation to the beast which she said was given to her as an *amasi* beast.

In the course of their argument reference was made to the statement appearing in Stafford and Franklin's Principles of Native Law and the Natal Code at page 60 to the effect that she (a woman) also had the right to dispose of the *mumba* beast which a son-in-law gave to her. But neither Counsel had read the case Nkunzi *v.* Fred Nyawose, page 47, N.H.C. 1916 (Pt. 1), which is quoted in support of the statement. Had they read the case they would have seen that a woman's right to dispose of a *mumba* beast was qualified by the words "subject to the control of her husband." They would also have seen that a *mumba* beast was a gift to the mother of a bride and not to the bride herself as was the position in the case now before us.

There can be no doubt that the plaintiff had no right to the judgment granted to her by the Additional Native Commissioner and defendant's appeal must succeed. As the point taken by this Court in deciding the appeal was not taken by appellant he cannot be awarded the costs of the successful appeal.

It is accordingly ordered that the appeal be and it is hereby allowed; the judgment of the Additional Native Commissioner is set aside and for it is substituted "The summons is dismissed with costs."

For Appellant: Adv. Humphrey instructed by Wynne & Wynne.

For Respondent: Mr. R. I. Arenstein of Arenstein & Fehler.

SOUTHERN NATIVE APPEAL COURT.

PLATYI *v.* **TSHONELA.**

N.A.C. CASE No. 27 OF 1956.

KING WILLIAM'S TOWN: 13th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal out of time if notice not stamped within period allowed for noting.

Summary: Written notice of appeal was lodged with the Clerk of the Court within 21 days as provided for by Rule 4, read with Rule 31 (2) of the Rules for Native Appeal Court, published under Government Notice No. 2887 of 1951, but was not stamped as required by Rule 76 (4) of those Rules.

In fact, when the case was called on for hearing the Registrar was not yet in possession of a stamped Notice of Appeal and no application had been made for condonation of the late noting of the appeal.

Held: That as the notice of appeal was not stamped timeously the appeal was out of time and could not be proceeded with in the absence of an application for condonation of the late noting thereof.

Cases referred to:

Mpanza *v.* Mpanza, d.a., 1953, N.A.C. 66 (N.E.).

Statutes referred to:

Government Notice No. 2887 of 1951, as amended.
Government Notice No. 2886 of 1951, as amended.

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Balk (President):—

In this appeal from the judgment of a Native Commissioner's Court, the notice of appeal was lodged with the Clerk of the Court timeously, i.e. within twenty-one days after the date of the judgment as provided by Rule 4 read with Rule 31 (2) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended. But that notice was not stamped as required by Rule 76 (4) read with Item 10 of Table C of the Second Annexure to the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, and remained unstamped after the period of twenty-one days referred to above had expired. In point of fact the notice in question has not as yet been returned duly stamped to the Registrar of this Court so that there is no appeal before this Court. Here it should be mentioned that as the notice of appeal was not stamped timeously, the appeal is out of time and in any case cannot be proceeded with in the absence of an application for condonation of the late noting of the appeal, see Mpanza *v.* Mpanza d.a., 1953, N.A.C. 66 (N.E.).

In the result the appeal should be struck off the roll, with costs.

E. J. H. Yates (Member): I concur.

C. H. Warner (Member): I concur.

For Appellant: Mr. Heathcote, King William's Town.

For Respondent: Mr. Stewart, King William's Town.

SOUTHERN NATIVE APPEAL COURT.

SIKWANA *v.* NTLANGANO.

N.A.C. CASE No. 30 OF 1956.

KING WILLIAM'S TOWN: 13th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

Late noting of appeal—Application for condonation to be in form prescribed by Rules of Court and supported by affidavit furnishing reason for late noting.

Summary: A notice of appeal from a Native Commissioner's finding in an enquiry held in terms of Section 3 (3) of the Regulations published under Government Notice No. 1664 of 1929, as amended, was filed late. The only mention in the papers before the Court of condonation of the late noting of appeal was in the notice of appeal itself.

Held: That in applications for condonation of the late noting of appeals the requirements of Rule 4 read with Rule 14 of the Rules for Native Appeal Courts, published under Government Notice No. 2887 of 1951, as amended, should be complied with and that such applications should be supported by affidavits giving, *inter alia*, the reasons for the delay in noting as, in terms of the said Rule 4, condonation may only be granted upon just cause being shown.

Cases referred to:

Shangase *v.* Kumalo, 1952, N.A.C. 240 (N.E.).
Mabanga *v.* Msidi, 1953, N.A.C. 82 (C.).
Kodisang *v.* Seakgela, 1945, N.A.C. (C. & O.), 51.

Statutes referred to:

Government Notice No. 2887 of 1951, as amended.
Appeal from the Court of the Native Commissioner, Lady Frere.

Balk (President):—

This is an appeal from a Native Commissioner's finding in an inquiry held in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended.

The Native Commissioner's finding was entered on the 9th March, 1956, and the appeal was noted on the 12th June, 1956, when the period of twenty-one days allowed by Rule 4 of the Rules for this Court, published under Government Notice No. 2887 of 1951, as amended, for the noting of an appeal, which period is here applicable, had already expired so that the appeal was noted late.

The only mention in the papers before this Court of condonation of the late noting of the appeal is in paragraph 6 of the notice of appeal in which such condonation is sought and reasons for the late noting are given.

Apart from the fact that a request for condonation of the late noting of an appeal, embodied in a notice of appeal, cannot be regarded as a proper application for such condonation in that it does not conform to the requirements of Rule 4 read with Rule 14 of the Rules for this Court, it is the established practice of this Court and its sister Courts to require that an application for condonation of the late noting of an appeal shall be supported by an affidavit or affidavits giving, *inter alia*, the reasons for the delay in the noting as, in terms of Rule 4, the condonation may only be granted by the Court upon just cause being shown; and this can only properly be done by the applicant's adducing evidence

of, *inter alia*, the reasons for the late noting which, in accordance with established practice, is required to be in the form of an affidavit or affidavits, see Shangase *v.* Kumalo, 1952, N.A.C. 240 (N.E.), Mabanga *v.* Msidi, 1953, N.A.C. 82 (C.) and Kodisang *v.* Seakgela, 1945, N.A.C. (C. & O.), 51.

It follows that in the instant case no proper application for condonation of the late noting of the appeal is before this Court and he appeal should accordingly be struck off the roll, with costs.

Mr. E. J. H. Yates (Member): I concur.

Mr. C. H. Warner (Member): I concur.

For Appellant: Mr. Stewart, King William's Town.

For Respondent: Mr. Tsotsi, Lady Frere.

CENTRAL NATIVE APPEAL COURT.

NDEBELE *v.* BANTU CHRISTIAN CATHOLIC CHURCH IN ZION.

N.A.C. CASE No. 23 OF 1956.

JOHANNESBURG: 1st November, 1956. Before Wronsky, President, Warner and Smithers, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Commissioner's Court—Definition of "Native"—Corporate bodies.

Summary: The Executive Committee of the respondent Native Church sued in the Native Commissioner's Court for the ejectment of the appellant from premises owned by the church. The evidence disclosed that the church body as such held immovable property in terms of its constitution and that it also enjoyed perpetual succession. The point not having been taken on appeal.

Held: That the Court was empowered *ex mero motu* to consider the question of jurisdiction.

Held further: That the church is a legal entity apart from its members; that as such it is not a "Native" as defined in the Native Administration Act, 1927, and that, consequently the Native Commissioner's Court had no jurisdiction to hear the matter.

Cases referred to:

Tsautsi *v.* Nene and another, 1952, N.A.C. 73.
Mdhluli *v.* Zion Apostolic Church of S.A. and Moshaba, 1945, N.A.C. (N. & T.), 63.
Gumede *v.* Bandhle Vukani Bakithi, Ltd., 1950 (4) S.A. 560.
Khumalo *v.* Insulezibensi Ubopumuze Swartkop Native Company, 1954, N.A.C. 70.
Moloi *v.* St. John Apostolic Faith Mission, 1954 (3) S.A. 940.

Statutes referred to:

Section 35 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Johannesburg.

Wronsky, President (delivering judgment of the Court):—

In this action the claim in the Native Commissioner's Court was for the ejectment of defendant from 43, Meyer Street, Sophiatown, property held by the Bantu Christian Catholic Church in Zion, an association in terms of Government Notice No. 2886 of 9th November, 1951. The church body holds the property through its trustees appointed in terms of Clause 20 of its constitution.

The defendant in his plea denied that he unlawfully occupied the property or that the plaintiff was duly elected or appointed as the Executive Committee of the said church or that it was empowered to bring or institute the action.

It would appear from the evidence of Elphas Mbatha the Secretary of the Committee, that there was a church known as the Christian Catholic Church in Zion in South Africa, and that there were many schisms in this church as a result of which the Bantu Christian Catholic Church in Zion in South Africa was formed in 1934 by a Mr. Mahon, apparently a European, on his return from America.

The facts of the case broadly as disclosed by the evidence are as follows:—

Prior to 1952 there was a split in the church and a constitution to control the affairs of the church was drawn up. This constitution was accepted by all the members including the defendant. During 1953 the defendant who was then stationed at Sophiatown was transferred to Newcastle, Natal; his place was to have been taken by the Rev. Vilakazi of Bergville. Vilakazi arranged to assume office but defendant refused to vacate the church property and kept the church locked and he is in fact still in occupation. This action was instituted for the purpose of ejecting him from the property and having it restored to the control of the governing body of the church.

Most of the evidence adduced and the supporting arguments in the Court below as well as in this Court were centred on the question whether the Executive Committee which set this action in motion had been appointed in terms of the constitution or that it had authority to sue. The Native Commissioner found that the Plaintiff Committee was in fact properly constituted and had auhority to institute the action. He gave judgment for the plaintiff as prayed with costs against which an appeal has been noted on the following grounds:—

A. That the judgment is against the evidence and the weight of evidence.

B. That the judgment is bad in law in that the Presiding Officer erred in finding:—

(*a*) That it was an implied term of the Constitution that an executive committee once duly elected shall continue to hold office until it retires or is dismissed even though its term of office under the Constitution has expired, and more particularly the Presiding Officer erred in applying the law of contract to the instant case.

(*b*) That eleven members of the Committee held office as members of the Executive Committee at the time of the issue of the summons.

(*c*) That all eleven members of the Executive Committee who had held office unanimously agreed from the time of their election in October, 1953, until the date of issue of summons that defendant should vacate the premises in question.

(*d*) That the Plaintiff Committee had authority under the Constitution to sue the defendant for ejectment.

(*e*) That the two new members were validly elected as the evidence was that the meeting was irregularly held on the 9th December, 1954, more particularly in that there were more than two delegates from branches and that short notice was given of the meeting.

(*f*) That such irregularities could be ratified, and erred in holding that defendant was estopped from raising any such irregularity as a defence.

(*g*) That the two new members could not have caused prejudice to the defendant.

(*h*) That even if the two new members were not properly elected the Committee was competent to act.

(*i*) That even if the two new members were erroneously joined the Committee's *locus standi in judicio* was not affected thereby.

(*j*) That it is clear that the Constitution contemplates that at all times there shall be an Executive Committee.

This Court has, *mero motu,* raised the question whether the Native Commissioner's Court had jurisdiction to try this action.

Paragraph 3 of the particulars of claim reads as follows:—

> " Defendant and all the members of the said association are Natives as defined by Act No. 38 of 1927 ".

This allegation was admitted in defendant's plea.

The parties, however, cannot, by agreement confer jurisdiction on the Court. If a Court finds the matter before it to be beyond its jurisdiction, it must refuse to proceed, even though neither party takes the objection (see case of Tsautsi *v.* Nene and Another, 1952, N.A.C. 73 (S), at page 75).

The jurisdiction of a Native Commissioner's Court is limited to actions between Native and Native and the question to be decided is whether the Bantu Christian Catholic Church in Zion (plaintiff in this case) falls within the ambit of the definition of a Native.

" Native " is defined in section *thirty-five* of the Native Administration Act (Act No. 38 of 1927), as follows:—

> " Native " shall include any person who is a member of any aboriginal race or tribe of Africa. The rest of the definition is not material in this case.

In the case of Mdhluli *v.* 'Zion Apostolic Church of South Africa and Mashaba, 1945, N.A.C. (N. & T.) 63, it was stated (on page 64) that, without proof that membership of a church is restricted to Natives only a Native Commissioner's Court could have no jurisdiction to try any action in which the church as such was a party.

Clause 1 of the constitution which has been produced in this case reads:—

> " This Church shall be known as the Bantu Christian Catholic Church in Zion, a body whose object is to maintain and spread the teachings of this Church ".

There is no stipulation in the constitution that membership of the Church is restricted to persons of any paricular race nor was evidence brought to show that there is any restriction of this nature.

On this ground alone the Native Commissioner should have found that he had no jurisdiction to try the action but there is the further point that he has recorded that it is common cause

that the Bantu Christian Catholic Church in Zion is a corporate body. It, therefore, becomes necessary to consider whether this Church is, in fact, a corporate body because, if it is a legal *persona* distinct from the members who compose it, it follows that such *persona* cannot possess characteristics which belong to a race of people. In other words the Church, as a legal *persona*, cannot be classed as a Native even if membership is restricted to Natives (see cases Gumede *v.* Bandhle Vukani Bakithi, Ltd., 1950 (4) S.A. 560 (N) and Khumalo *v.* Insulezibensi Nkopumuze Swartkop Native Company, 1954, N.A.C. 70 (N.E.).

Clauses 2, 18 and 19 of the constitution of the Bantu Christian Catholic Church in Zion read as follows:—

> "2. The Church shall be governed by an Executive Committee of thirteen (13) members, which shall include a Chairman and Assistant Chairman, a Treasurer and Assistant Treasurer, a Secretary and Assistant Secretary.
>
> Seven (7) Members of this Committee shall constitute a quorum and in the case of a tie the Chairman shall have a casting vote. This Committee shall be elected annually at the Annual Conference to be held in the month of October in each year.
>
> 18. The Church may sue or be sued in the name of the Executive Committee and any documents that may be required to be executed shall be signed by the Chairman and Secretary.
>
> 19. The Church shall be entitled to acquire, purchase or lease any fixed property, and also any movable property, and may sell, lease, mortgage or dispose of same as may from time to time be decided upon."

In the case of Mdhluli *v.* Zion Apostolic Church of South Africa and Mashaba (*supra*) it was stated that by a "universitas" is understood a judicial entity created as a result of the association of a number of natural persons with one and the same object and that, once established, the subject of legal rights and obligations is the invisible entity and not the members of the association, either individually or jointly. It was also stated that its financial and other interests should be separate from those of individual members forming the universitas.

In the case of Moloi *v.* St. John Apostolic Faith Mission, 1954 (3) S.A. 940 (T), Murray, J., at page 942 referred to several cases and stated that the essentials are the holding of property apart from the individual members and the possession of perpetual succession.

The constitution of the Bantu Christian Catholic Church in Zion shows that the Church has property apart from the individual members of the church, and that these individual members are not possessed of any rights of ownership in that property. Their only claim is as members of a corporate body.

Clauses 14 and 15 of the Constitution read as follows:—

> "14. The Executive Committee shall have power to refuse or reject any application for membership to the Church, without having to assign any reason therefor.
>
> 15. The Executive Committee shall have power to discipline any member, Minister or official or officer of the Church or Branch Churches".

It is clear from these clauses that the Church goes on even although the existing members leave it so that the Church possesses perpetual succession.

It follows that the Church is a legal *persona* distinct from its members and, therefore, in addition to the fact that it has not been proved that membership is restricted to Natives, it does not fall within the definition of a "Native" so that the Native Commissioner's Court had no jurisdiction to hear and determine a case in which this Church is a party.

The appeal falls to be allowed and the judgment of the Native Commissioner altered to one dismissing the summons with costs.

As the appeal is allowed on a ground not raised in the notice of appeal but by the Court *mero motu*, there will be no order as to costs.

For Appellant: Adv. J. Phillips, i/b Mr. B. A. S. Smits.

For Respondent: Adv. D. Spitz, instructed by Mr. S. Goss.

SOUTHERN NATIVE APPEAL COURT.

TONG *v.* **NTWAYABOKWENE.**

N.A.C. CASE No. 42 OF 1956.

KING WILLIAM'S TOWN: 16th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Noting of appeal incomplete without deposit of respondent's costs—Application for condonation of late noting—Considerations.

STATUTE LAW.

Rents Act, 1950—*Circumstances amounting to lessor's "reasonably requiring" premises in terms of Act.*

Summary: Judgment was given in this matter by the Native Commissioner on the 5th July, 1956, and on 7th August, 1956, appellant filed his notice of appeal. He deposited the security for respondent's costs of appeal on the 23rd August, 1956. He applied for condonation of late noting giving the following explanation for late noting of the appeal:—

The trial of the matter was heard on 12th July, 1955, and that judgment was delivered on the 5th July, 1956, when he was away in Johannesburg on leave. On 9th July he sent his attorneys a telegram inquiring what the result of the action was, but received no reply. He arrived back on 24th July, 1956, and was informed of the judgment on the 25th July.

As the period of 21 days prescribed for the noting of the appeal by Rule 4 read with Rule 31 (2) of the Rules for this Court (Government Notice No. 2887 of 1951, as amended), had not yet expired on 25th July, 1956, the applicant had up to 31st July, 1956, to note the appeal.

On the issue between the parties in which plaintiff (appellant) sought an order for the ejectment of the defendant from certain premises, defendant denied that plaintiff was his landlord and also denied that plaintiff reasonably required the premises for his own personal occupation.

Defendant admitted in cross-examination that, on receipt of notice to vacate the room, he also accepted the position that the plaintiff required it for his own use and occupation, and that he tried unsuccessfully to find other accommodation.

Held: That the noting of the appeal was incomplete until the respondent's costs of appeal had been deposited with the Clerk of the Court.

Held further: That, whilst the reasons given do not satisfactorily explain the delay in noting the appeal, the applicant had sufficient prospect of success on appeal to justify the granting of the application.

Held further: That the plaintiff had established, on a balance of probability, that, in relation to defendant, he was the lessor of the room of which defendant was lessee and that he "reasonably required" the room for the occupation of his child within the meaning of Section 21 (1) (*c*) read with Section 1 of the Rents Act, 1950, as amended.

Cases referred to:

Mtembu & Another *v.* Zungu, 1953, N.A.C. 52 (N.E.).
Nxele and Tulani *v.* Makalaba, 1955, N.A.C. 7 (S.).

Statutes referred to:

Government Notice No. 2887 of 1951, as amended, Act No. 43 of 1950.

Appeal from the Court of the Native Commissioner, Salt River.

Balk (President):—

In this case the first matter to be considered is an application for condonation of the late noting of the appeal.

The reasons given by the applicant in his supporting affidavit for the delay in noting the appeal read as follows:—

"(*a*) The trial of this matter was heard on the 12th July, 1955, on which date judgment was reserved.

(*b*) That on the 25th June, 1956, my attorneys were informed that the Native Commissioner would give judgment on the 5th July, 1956.

(*c*) That on the 5th July, 1956, I was in Johannesburg on annual leave.

(*d*) That on or about the 9th July, 1956, I sent a reply paid telegram to my attorneys Messrs. J. C. Ince & Wood, requesting to be advised of the result of my case, but received no reply.

(*e*) That I arrived back in Cape Town on the 24th July, 1956.

(*f*) That my attorneys informed me of the judgment on the 25th July, 1956."

These reasons do not satisfactorily explain the delay; for the period of twenty-one days prescribed for the noting of the appeal by Rule 4 read with Rule 31 (2) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, had not yet expired on the 25th July, 1956, and the applicant had up to and including the 31st July, 1956, to note the appeal. It is true that he stated earlier in his affidavit, which is the only one filed in support of the application, that the period allowed for the noting of the appeal was fourteen days. But this erroneous impression on the part of the applicant does not assist him as it is manifest from his reasons quoted above that he was in touch with his attorneys on the 25th July, 1956, and learnt of the judgment on that day; and he does not explain why he did not then arrange for the appeal to be noted forthwith, particularly as he thought that he was already late; nor does he give any reason for having waited until the 7th August, 1956, before lodging the notice of appeal and until the 23rd August, 1956, before depositing the security for the respondent's costs of appeal without which the noting of the appeal was not complete, see Mtembu & Another *v.* Zungu, 1953, N.A.C. 52 (N.E.).

But this aspect does not conclude the matter as the merits of the proposed appeal were also relied upon by Counsel for the applicant and the application was opposed by Counsel for the respondent also in this respect. The merits, therefore, fall to be considered consonant with the decisions of this Court, see Nxele and Tulani *v.* Makalaba, 1955, N.A.C. 7 (S.).

In the view of this Court the applicant has sufficient prospect of success on appeal to justify the granting of the application and, accordingly, the late noting of the appeal is condoned.

Turning to the appeal, the Native Commissioner's Court decreed absolution from the instance, with costs, after the close by both parties of their cases, in an action in which the plaintiff (present appellant) sought an order for the ejectment of the defendant (now respondent) from certain premises.

In the particulars of his claim, the plaintiff averred that—

"1. At all times material to this action prior to the 30th day of April, 1955, plaintiff and defendant were respectively landlord and tenant of certain living premises situate at and known as 96 Francis Street, Cape Town, on a monthly lease and at a monthly rental of £2 payable in advance.

2. By letter dated the 28th January, 1955, plaintiff through his duly authorised agents duly gave defendant three months' notice to vacate the said premises on the grounds that he required the said premises for his own use and occupation.

3. A copy of the said notice was duly forwarded to the Secretary of the Rent Board.

4. Despite the said notice the defendant has failed and neglected to vacate the said premises."

The defendant's plea, as amended, reads:—

"1. Defendant denies that plaintiff is or ever was his landlord or that he is or ever was plaintiff's tenant of the premises situate at and known as 96 Francis Street, Cape Town, and puts plaintiff to the proof thereof.

2. Defendant admits receiving the letter referred to in paragraph 2 of plaintiff's summons, but denies that plaintiff reasonably required the premises for his personal occupation as alleged, and puts him to the proof thereof.

Alternatively and only in the event of the above Honourable Court finding that plaintiff does require the premises for his own personal occupation, which is denied, defendant avers that plaintiff has no right whatsoever to the said premises occupied by defendant."

The appeal is brought on the ground that the judgment is against the weight of the evidence.

The plaintiff's case, according to his evidence, is briefly, that he leased the whole of the premises in question from the owner's agents as from the 1st July, 1954, that he notified the defendant, who was at that time already the sub-lessee of a room on the premises, of the lease, that the defendant paid the rent for the room to him from the time he(plaintiff) had taken it over from the previous lessee, Jackson Tong, i.e. from the 1st July, 1954, that he required the room occupied by the defendant, as a bedroom to him from the time he (plaintiff) had taken it over from of his furniture and for this reason he gave the defendant three months' notice in writing on the 28th January, 1955, to vacate the room and that the defendant failed to comply with that notice.

The defendant, whilst admitting that he had paid the rent for the room occupied by him, to the plaintiff for the period from July, 1954, to April, 1955, denied that the plaintiff had notified

him that he had taken over Jackson Tong's lease. He stated that he first learnt that the plaintiff had taken over this lease when he received the notice to vacate and that he had paid the rent to the plaintiff because the latter had told him that he was employed by the owner's agents to collect it.

As pointed out by Counsel for appellant, it is manifest from the defendant's admission under cross-examination that on receipt of the notice to vacate the room, he accepted the position that the plaintiff was the lessee of the premises and tried to get other accommodation but without success. Moreover, the plaintiff's version that he had notified the defendant that he had taken over Jackson Tong's lease is more probable than the defendant's denial that he received notification thereof for it is manifest from the evidence that the plaintiff in fact leased the premises from the owner's agents as from the 1st July, 1954, and there appears to be no reason why the plaintiff should have misrepresented the position to the defendant, as the latter would have the Court believe, i.e. by advising the defendant that he had been employed by the owner's agents to collect the rent from him, when he could simply have advised the defendant of the true position, viz. that he was entitled to the rent by virtue of his lease. It is true that the defendant, after making the admission that he had accepted the position, stated that the only lessee of the premises whom he knew, was Jackson Tong. But this statement is manifestly not worthy of credence in the light of the defendant's evidence that he received no receipts for the rent which he had paid to the plaintiff, that he was worried about this matter and yet did not mention it to Jackson, who, according to him, had returned to the premises in July, 1954, and stayed on there. The defendant also admitted that he had not complained to the owner's agents about his not receiving receipts from the plaintiff. In these circumstances it is difficult to escape the conclusion that the defendant accepted the plaintiff as the lessee of the premises as from July, 1954, and that he from then assumed the position of a sub-lessee of the plaintiff.

It is also manifest from the defendant's admissions under cross-examination that on receipt of the notice to vacate the room he also accepted the position that the plaintiff required the room for his own use and occupation. That the plaintiff genuinely and reasonably needed that room immediately when he gave the defendant notice to vacate it, is clear from his (plaintiff's) testimonthly that the only room on the premises then available for his daughter aged 13 years was that occupied by him and his wife. Not only was this evidence not controverted by the defendant but he conceded in cross-examination that that was the position.

Counsel for respondent stated that he relied on the Native Commissioner's reasons for judgment. The latter, whilst conceding that there is some preponderance of probability in the plaintiff's favour in so far as the question whether the defendant became the plaintiff's sub-lessee is concerned, states that that preponderance is slight and certainly not decisive. But for the reasons given above, it is apparent that the preponderance of probability in the plaintiff's favour in the respect in question is, in fact, decisive.

The Native Commissioner also found that doubt had been cast on the plaintiff's bona fides as regards the grounds on which he required the defendant to vacate the room and gives his reasons for this finding. I will deal with those reasons *seriatim*.

It is true that the plaintiff's letter (Exhibit "B") to the defendant indicates that the former was dissatisfied because the latter did not assist in keeping the premises clean. It is also true that the letter (Exhibit "B") is dated that 13th January, 1955, whereas the notice to the defendant to vacate the room is dated the 28th idem. But the plaintiff explained in his evidence that he instructed

his attorney to issue the notice before he (plaintiff) wrote the letter (Exhibit "B") so that there is no justification for an inference adverse to the plaintiff on the basis that the plaintiff quickly followed up the letter (Exhibit "B") by the notice, as was drawn by the Native Commissioner.

Whilst admittedly the plaintiff denied that he had given the defendant a warning and the letter (Exhibit "B") is headed "Kitsiso", the plaintiff explained that "Kitsiso" means "notice" and that he did not regard that letter as a warning as it did not contain a threat. Moreover the plaintiff admitted having written the letter (Exhibit "B") immediately it was produced. It follows that the plaintiff's denial that he gave the defendant a warning is of no significance.

For the reasons given earlier in this judgment it is clear that the plaintiff did notify the defendant that he (plaintiff) had leased the premises.

The Native Commissioner states that the plaintiff's evidence is found to be unreliable also as regards the giving of receipts for the rent paid to him by the defendant. But he advances no reason for this finding and none suggests itself. On the contrary, in view of the inconsistencies and the improbabilities in the defendant's evidence referred to above, the plaintiff's testimony here too falls to be accepted.

The fact that the plaintiff did not sleep at the premises regularly prior to December, 1954, if anything, indicates his bona fides, bearing in mind that he took occupation of the premises in July, 1954, and did not give instructions until January, 1955, for the issue of the notice to the defendant to vacate the room.

That the plaintiff knew the limitations of the premises before he took them over is irrelevant since it was open to him to give the sub-tenants notice to vacate the rooms occupied by them if he reasonably required them for his own occupation.

There is nothing in the evidence to show that the plaintiff required the room occupied by the defendant for Jackson Tong, so I do not see why the plaintiff should have called Jackson as a witness. It is true that the plaintiff stated that Jackson returned to the premises in April, 1955, whereas the defendant stated that Jackson had done so in July, 1954. But, as pointed out above, the defendant's statement here is in itself detrimental to his credibility so that there was no reason for the plaintiff to to call Jackson on this score.

Admittedly the defendant in his letter (Exhibit "D") asked for the plaintiff's reasons for requiring him to vacate the room unexpectedly, but here it must be borne in mind that the defendant admitted that on receiving the notice to vacate he had tried to find other accommodation but without success.

It follows that the Native Commissioner's finding that doubt had been cast on the plaintiff's bona fides is not justified on the evidence.

A further point was raised in argument by Counsel for respondent, viz. that the letter (Exhibit "A") suggests that the owner was in doubt as to who the lessee of the premises was. But, as contended by Counsel for appellant, not only does the letter (Exhibit "A") not necessarily convey this, but even if it does so, it would be irrelevant as the evidence for plaintiff that he leased the premises from the owner's agents has not been controverted.

In the result the plaintiff has established, on a balance of the probabilities, that at the material times he was, in relation to the defendant, the "lessor" of the room of which the defendant was the "lessee" and that he (plaintiff) "reasonably required"

the room for the occupation of his child, within the meaning of section *twenty-one* (1) (*c*) read with section *one* of the Rents Act, 1950, as amended; and as these were the only points put in issue by the pleadings, the plaintiff has established his case.

Accordingly, the appeal should be allowed, with costs, and the judgment of the Court *a quo* altered to one for plaintiff as prayed, with costs.

E. J. H. Yates (Member): I concur.

C. H. Warner (Member): I concur.

For Appellant: Mr. Stewart, K.W.T.

For Respondent: Mr. Heathcote, K.W.T.

SOUTHERN NATIVE APPEAL COURT.

GAZI and ANOTHER *v.* **GAZI.**

N.A.C. CASE No. 55 OF 1956.

KING WILLIAM'S TOWN: 17th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Noting of appeal—Notice filed timeously but stamped late—Appeal out of time—Application for condonation of late noting—Considerations.

Action in rem *incompetent when rights at most* in personam.

Summary: Plaintiff successfully sued the defendants (appellants) in the Native Commissioner's Court for a declaration of rights over certain landed property, and an order for the ejectment of the defendants therefrom.

An unstamped notice of appeal was filed but was not stamped within the period of 21 days prescribed by the Rules for this Court as the period within which appeals should be noted.

The first ground of appeal was that the judgment was bad in law as the Native Commissioner erred in finding that registration of the land in the name of first defendant in the Deeds Registry was not conclusive proof that she was the owner of such land.

Held: That, as the notice of appeal was not stamped within the period allowed for noting of appeals, the appeal was out of time.

Held further: That, applying the principles enunciated in Rose & Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 A.D., this was not a case in which the applicant should be debarred from access to this Court owing to the negligence of his attorney in noting the appeal late.

Held further (on the merits of the appeal): That the real rights in the land vested in the first defendant upon registration in the Deeds Registry of the transfer of the land to her and that the plaintiff's right as against her was at most a *jus in personam*, i.e. a personal right.

Held further: That, that being so, the plaintiff could not succeed in her claims, based as they were on her having real rights in the land.

Cases referred to:

Re condonation: Mpanza *v.* Mpanza, d.a., 1953, N.A.C. 66 (N.E.)

Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.)

Mdudu *v.* Mdudu (1957 N.A.C. 1).

On merits of appeal:

Isaacson *v.* Scheffer, 1950 (1) S.A. 481 (T.P.D.)
Paruk and Others *v.* Cousins, N.O. & Another, 1948 (2) S.A. 830 (N.P.D.)
Ex parte Hassan, 1954 (3) S.A. 536 (T.P.D.)

Mabele *v.* Pungula and Others, 1952, N.A.C. 48 (N.E.)

Appeal from the Court of the Native Commissioner, Stutterheim.

Balk (President):—

In this case the notice of appeal was lodged with the Clerk of the Court timeously but it was not stamped within the period allowed for the noting of the appeal so that the appeal is out of time, see Mpanza *v.* Mpanza, d.a., 1953, N.A.C. 66 (N.E.).

In his affidavit filed in support of the application for condonation of the late noting of the appeal, the applicants' attorney explains that, as the Clerk of the Court at Stutterheim cancelled the stamps on the notice of appeal without, as far as he (the attorney) has been able to ascertain, notifying the latter's office, he could only conclude that when the notice of appeal was handed to the Clerk of the Court, who has since resigned from the public service and left Stutterheim, the stamps were pinned but not affixed to the notice.

In support of his submission that this was not a case in which the applicants should suffer for their attorney's neglect to the extent of being debarred from proceeding with their appeal, Counsel for the applicants cited Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.).

Counsel for respondent opposed the application, citing Mdudu *v.* Mdudu (Case No. N.A.C. 21/56 heard before this Court at King William's Town on the 12th July, 1956. 1957 N.A.C. 1) in support of his contention that the oversight by the applicants' attorney to affix the stamps to the notice of appeal did not constitute a satisfactory explanation for the delay. He further contended that the applicants had no prospect of success on appeal.

Applying the principles enunciated in Rose's case (*supra*) and finding that the applicants could not be said to be without a prospect of success on appeal, this Court condones the late noting of the appeal.

Here it should be mentioned that not only was there negligence on the part of the applicant's attorney in Mdudu's case (*supra*) in considerably greater degree than in the present case, but that the decision there turned on the applicant's having no prospect of success on appeal.

Turning to the appeal, the plaintiff (now respondent) brought an action in a Native Commissioner's Court against the two defendants (present appellants) in which she sought a declaration of rights over certain land, an order for the defendants' ejectment therefrom, alternative relief and costs.

In the particulars of her claim, as amended with the leave of the Court *a quo*, the plaintiff averred—

" 1. That the parties hereto are Native as defined by Act No. 38 of 1927.

2. That plaintiff is a widow and 1st defendant is her daughter who is living in concubinage with second defendant on Lot No. 141, Kubusie, within the municipal area of Stutterheim.

3. That plaintiff states that the said Lot No. 141, Kubusie is her bona fide property which she acquired in or about 1925 by purchase from the Estate of the late Moses Mgcanga for £85 and which plaintiff had registered in the name of the 1st defendant.

4. That at all relevant times defendants lived on plaintiff's allotment *precario* and at plaintiff's pleasure.

5. That since about 1953 defendants have been making life unpleasant for plaintiff and 1st defendant now claims that the said Lot No. 141, Kubusie is her property."

The defendants pleaded—

"1. Plaintiffs (*sic*) admit para. No. 1 thereof.

2. Add para. 2. Defendants admit that plaintiff is a widow and the mother of defendant No. 1. Defendants state that they have never and are not at present residing on Lot No. 155 but admit that plaintiff has and is at present residing with them on Lot No. 141, situate at Kubusie in the Municipality and District of Stutterheim.

Defendants further state that they were married by Christian rites at Stutterheim on the 12th October, 1943.

3. Add para. 3. Defendants are unable to admit or deny plaintiff's ownership of Lot No. 155 on the basis that plaintiff has incorrectly quoted Lot No. 155 as being Lot No. 141, defendants deny plaintiff's allegations and specially state—

(*a*) that defendant No. 1 purchased Lot No. 141 from the Estate of the late Moses Ngcaga for the sum of £65 and that as a result of such purchase defendant No. 1 is the registered owner of such lot under Deed of Transfer No. 870/1925, dated at King William's Town on the 9th October, 1925;

(*b*) that simultaneously with the registration of transfer aforesaid defendant No. 1 registered the First Mortgage Bond for the sum of £50 over Lot No. 141 in favour of Philip Paul Gerard Kropf on the 9th October, 1925, and which Mortgage Bond was cancelled on the 8th December, 1938;

(*c*) that defendant No. 1 has personally paid the initial deposit on account of the purchase price as also the capital, interest and costs of cancellation of the aforesaid Mortgage Bond as also all Municipal and divisional Council rates levied in respect of such property.

4. Add para. 4. Defendants deny plaintiff's allegations and state that plaintiff herself is residing on Lot No. 141, free of rental and at the pleasure of defendant No. 1.

5. Add para. 5. That defendants have no knowledge of plaintiff's allegations and deny plaintiff's ownership of Lot No. 141.

Wherefore defendants pray that plaintiff's claim may be dismissed with costs."

Here it should be mentioned that, prior to the amendment of the particulars of claim, it was stated therein that the land in dispute was Lot No. 155.

The judgment of the Court *a quo* reads as follows:—

"For plaintiff as prayed, with costs of suit in the following terms, viz. paragraphs 2 and 3 of the summons, as amended, namely: The Lot No. 141, Kubusie, is declared to be plaintiff's property and that she is entitled to the occupation and possession thereof. Order of ejectment granted. Plaintiff declared a necessary witness. Defendant to pay costs of suit."

The appeal against that judgment is brought on the following grounds:—

"1. That the judgment is bad in law in that the learned Native Commissioner erred in finding that registration of the land in the name of first defendant in the Deeds Registry was not conclusive proof that she was the owner of such land.

2. That the learned Native Commissioner erred in Law in finding that plaintiff being married in community of property was a minor at the time of her alleged purchase of the land in 1925, and as such her contracts were voidable at the instance of her husband, was more academic than substantial and that such purchase was not *ipso jure* void.

3. If it is found as a fact that plaintiff did purchase the property, then the learned Native Commissioner should have found in law that plaintiff being a widow previously married in community of property had no status to bring the action without being joined by the legal representative of her late husband's estate, as the property belongs to the estate. Plaintiff as beneficiary in her late husband's estate has no real right to the property as there is a dispute as to ownership; Plaintiff only has a *jus in personam ad rem acquirendam* against the Executor of the Estate. As such the learned Native Commissioner should have upheld defendants' contentions at the end of plaintiff's case and held that plaintiff was out of Court.

4. That the learned Native Commissioner erred in law in finding that whether or not the estate should have been reported does not in any way affect defendant's position because if it is found as a fact that the property does not belong to first defendant, then it can only belong to the estate and as such plaintiff has no status to bring an action for a Declaration of Rights and ejectment against defendants.

5. That the judgment is bad in law as on the balance of probabilities the learned Native Commissioner should have given judgment for defendants.

6. That on the facts the judgment is against the weight of evidence in that the learned Native Commissioner should have found that first defendant bought and paid for the property especially in view of the fact that it is common cause that the property is registered in the name of first defendant, all receipts of payments are in the name of first defendant and first defendant was registered debtor under the Mortgage Bond No. 225 of 1921 over the property, of which mortgage bond, plaintiff denied all knowledge.

Alternatively, should it be held that the appeal must fail on grounds (1), (2), (3), (4), (5) and (6) the defendants appeal on the following additional grounds:—

7. That the judgment is bad in law in that the learned Native Commissioner erred in finding that plaintiff had adduced sufficient evidence to prove that she had purchased the property and as there was a direct conflict between plaintiff's evidence and defendants' evidence, the learned Native Commissioner should have given judgment of absolution from the instance with costs."

Counsel for respondent contended, on the authority of Isaacson *v.* Scheffer, 1950 (1) S.A. 481 (T.P.D.) that it was not competent for the defendants to take the points raised in the first four grounds of appeal.

Dealing with the first ground of appeal, it seems to me that the defendants' plea sufficiently covers the point raised, in that ground in that it is specifically stated in the plea that the first defendant is the registered owner of the land and that the plaintiff's ownership is denied. Moreover the point raised in the first ground of appeal was, according to the record, initiated in the Court below by the plaintiff's attorney and fully argued there so that there is no substance in the contention by Counsel for respondent in so far as the first ground of appeal is concerned.

Proceeding with the first ground of appeal, I will assume, without deciding, that the plaintiff's version, as disclosed by her evidence, is the correct one. In her testimony the plaintiff states that she purchased the land and had it registered in the first defendant's name because she was afraid that her husband would otherwise claim it. It seems to me from this evidence that it was the plaintiff's intention as well as that of the others concerned in the transaction, that the *dominium* or *jus in re* in the land was to pass to the first defendant. That it did in fact so pass is clear from the relative deed of transfer (Exhibit "A") and from the evidence of both parties. It is true that the plaintiff also states in her evidence that, although the land is registered in the first defendant's name, it is her (plaintiff's) property but this appears to amount to no more than an expression of opinion. Fraud was not relied upon by either party and, to my mind, the question of fraud as between the parties in so far as the registration of the land in the first defendant's name is concerned, does not, on the evidence, arise; and the position of the plaintiff does not fall within any of the acknowledged exceptions to the principle that real rights in immovable property can only be validly constituted by registration in a deeds registry. It follows that the real rights in the land, in so far as concerns the instant case, are vested in the first defendant and that the plaintiff's right as against the first defendant is at most a *jus in personam*, i.e. a personal right to claim transfer of the land. That being so, the plaintiff cannot succeed in her claims against the defendants for a declaration that she is the owner of the land and for their ejectment, based, as these claims are, on her having real rights in the land, see Paruk and Others *v.* Cousins, N.O. & Another, 1948 (2) S.A. 830 (N.P.D.), *ex parte* Hassan, 1954 (3) S.A. 536 (T.P.D.) and Mabele *v.* Pungula and Others, 1952, N.A.C. 48 (N.E.), at page 50.

Counsel for respondent submitted that if the appeal went against him on the first ground, it was for this Court to consider the question of granting the plaintiff alternative relief under her prayer therefor. But this submission does not appear to be sound as it is manifest from the plaintiff's evidence and from her attorney's address in the Court below that she in fact relied on her claims for a declaration of rights that she was the owner of the land and for the defendant's ejectment therefrom. Moreover it seems to me that the plaintiff is not entitled to succeed in any event as the evidence is silent as regards the obligations, if any, incurred by the first defendant in the matter of the registration of the land in her name.

It follows that the appeal succeeds on the first ground and it is unnecessary to consider the remaining ones. Accordingly the appeal should be allowed, with costs, and the judgment of the Court *a quo* altered to a decree of absolution from the instance, with costs, on all claims.

E. J. H. Yates (Member): I concur.

C. H. Warner (Member): I concur.

For Appellant: Mr. Heathcote, King William's Town.

For Respondent: Mr. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT

MGOMA *v.* **KULATI and ANO.**

N.A.C. CASE No. 38 OF 1956.

KING WILLIAM'S TOWN: 19th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Presiding Judicial Officer to record his decision on an application. Evidence—Secondary evidence of document—Admissibility—Hearsay rule.

TEMBU CUSTOM.

Kraalhead's responsibility for torts by inmate—Meaning of "residence".

Summary: Plaintiff sued first and second defendants for damages for the seduction and pregnancy of his daughter. Second defendant, the father of the first, denied liability for the tort, which his son admitted having committed at his father's kraal, after he, himself, had already married. The claim against second defendant was dismissed and plaintiff appealed against this portion of the judgment.

During the hearing plaintiff's attorney applied for an amendment of the claim in the summons, in consequence of which defendants' attorney also applied for an amendment of the plea. First defendant by this amendment accepted responsibility for the seduction, which he had previously denied.

The presiding judicial officer did not record his decisions on the applications, but entered judgment against the first defendant in terms of the admission.

The reasons for judgment furnished by the presiding judicial officer showed that he had placed reliance on a certain permit which was not produced.

Tembu custom being applicable, and, as the question whether a kraalhead was liable under this law and custom for the actionable wrongs committed by an inmate of his kraal after the latter had contracted a customary union, but had continued to reside at such kraal, had apparently not been decided before, this Court referred this question to the Native Assessors for an expression of their views, which are fully recorded at the end of the judgment.

Held: That it was a requirement that the judicial officer presiding in the case should record his decisions on applications for amendment of pleadings and that the record was not complete without such an entry.

Held further: That a kraalhead is liable, in Tembu Custom, for the actionable wrongs of an inmate of his kraal even after such inmate has contracted a customary union if the latter continues to reside at such kraal.

Held further: That a qualification of the kraalhead liability, mentioned by the Assessors, making it contingent upon the inmate's not having sufficient livestock to meet the damages in full, is not capable of application in that it has been laid down already that the kraalhead and inmate concerned must be sued jointly, and as it is open to the inmate to dispose of his stock even after judgment has been given against him, provided he does so before it is attached in pursuance of such judgment.

Held further: That, as it is difficult to distinguish between a "temporary" and a "casual" visit, and as it has been laid down in *ex parte* Minister of Native Affairs, 1941, A.D. 53, that a temporary visit cannot be regarded as residence, no precise definition of "residence" can be given, and each case falls to be decided on its merits.

Held further: That, where there was nothing to show that a permit had been lost or destroyed, or was not otherwise available, and that proper search had been made for it, it was not competent for the presiding judicial officer to take cognizance of the secondary evidence adduced in connection with the permit.

Held further: That, in any event, there is nothing to indicate that the permit is excluded from the hearsay rule so as to permit of its being admitted in evidence on its mere production as proof of the facts shown by the entries therein.

Cases referred to:

Fono v. Tomose, 1930, N.A.C. (C. & O.) 48.
Gqoboka *v.* Magxaba and Xwara, 3 N.A.C. 274.
Gonyela *v.* Sinxoto, 2 N.A.C. 69.
Gunyani *v.* Modesane, 1 N.A.C. 255.
Rubulana *v.* Tungana, 1 N.A.C. 90.
Fandesi *v.* Ntsizi and Ntsizi, 4 N.A.C. 13.
Skenjana *v.* Guza & Others, 1944, N.A.C. (C. & O.), 102.
Mhlokonyelwa *v.* Ngoma, 1 N.A.C. (S.D.) 197.
Ex parte Minister of Native Affairs, 1941, A.D. 53.
Rex *v.* Amod & Co. (Pty.), Ltd. and Another, 1947 (3) S.A. 32.
Rex *v.* De Villiers, 1944, A.D. 493.
Hassim *v.* Naik, 1952 (3) S.A. 331 (A.D.)

Appeal from the Court of the Native Commissioner, Lady Frere.

Balk (President):—

The plaintiff sued the first and second defendants in a Native Commissioner's Court for five head of cattle or £50 as damages for the seduction of his daughter, Vuyiswa, averring in the particulars of his claim that—

"1. That the parties to the suit are Natives as defined by Act No. 38 of 1927.

2. That plaintiff is the guardian and father of Vuyiswa and second defendant is the guardian and kraalhead of first defendant and as such is liable for torts and delicits committed by first defendant.

3. That about or during May, 1954, and at Macubeni Location, Glen Grey, first defendant wrongfully and unlawfully seduced and rendered pregnant plaintiff's daughter, the said Vuyiswa.

4. That in the premises plaintiff has suffered damages to the extent of 5 head of cattle or £50 their value, for which he holds defendants liable, jointly and severally, and for which plaintiff hereby makes claim.

5. That the customary report was made to second defendant and that first defendant was at that time away at work.

6. That first defendant has since admitted liability and promised to pay plaintiff the damages claimed.

7. That despite demand defendants refuse and/or neglect to make payment.

Wherefore plaintiff prays for judgment against defendants as above with costs."

The defendants pleaded as follows:—

"(1) Defendants admit paragraphs 1, 5 and 7 of the summons.

(2) As to paragraph 2 of plaintiff's summons defendants admit that plaintiff is the guardian of Vuyiswa but they deny the further and other allegations therein contained and puts plaintiff to the proof thereof.

(3) Firstnamed defendant denies the allegations contained in paragraphs 3 and 6 of plaintiff's summons and puts plaintiff to the proof thereof.

(4) As to paragraph 4 of the summons defendants deny that they are liable for any damages alleged to have been sustained by plaintiff either jointly and severally or otherwise and put plaintiff to the proof thereof.

(5) Defendants say that in 1954 firstnamed defendant was a married man and had already established his own kraal.

Wherefore defendants pray that plaintiff's summons may be dismissed with costs."

During the course of the hearing of the action in the Court below, the plaintiff's attorney applied for the amendment of paragraph 2 of the particulars of claim by the addition thereto of the words—

"Alternatively first defendant was an inmate of second defendant's kraal at the time of the alleged seduction and consequently, in the premises, second defendant is liable therefor."

The defendant's attorney did not object to this application but intimated that he might have to apply for an amendment of the defendant's plea. The hearing was thereupon postponed. At the resumed hearing of the case, the defendant's attorney applied for the amendment of the defendant's plea by the substitution for paragraph (3) of the following paragraph:—

"(3) (*a*) First-named defendant admits having seduced and rendered pregnant the said Vuyisya—and accordingly consents to judgment, with costs to date hereof.

Firstnamed defendant offers to liquidate the judgment and costs by payment of £1 per month the first payment whereof to be made on the 31st day of July, 1956.

(*b*) Firstnamed defendant denies that he is an inmate of secondnamed defendant's kraal or was such at the time he seduced the said Vuyiswa.

Firstnamed defendant admits, however, that he was staying at his father's kraal at the time but was there temporarily on a visit—for a period of two weeks. Firstnamed defendant says he is a married man and as his own kraal which he established long before the committed the said tort."

The Assistant Native Commissioner did not record his decision on these applications but from the fact that he entered judgment forthwith against the first defendant in terms of the defendant's amended plea coupled with the fact that the application for that amendment was made in consequence of the application to amend the particulars of claim, it may properly be implied that the Assistant Native Commissioner granted both applications and the appeal will be dealt with on this basis. The Assistant Native Commissioner's attention is directed to the necessity for recording his decision on such applications as apart from the fact that this aspect may form an important factor in an appeal, the record is not complete without such an entry.

At the conclusion of the hearing the Assistant Native Commissioner dismissed the summons against the second defendant and the appeal is brought by the plaintiff against this part of the judgment on the following grounds:—

" 1. That the judgment is against the weight of evidence and is not supported thereby.

2. That the evidence establishes that when he committed the delict the first defendant was an inmate of the kraal of the second defendant and consequently the Court should have found that second defendant was „ jointly and severally liable with the first defendant."

The first defendant's evidence that he was married when he seduced Vuyiswa and that the second defendant provided the dowry for his (first defendant's) wife is not disputed.

The question whether a kraalhead is liable under Tembu law, which applies here, for the actionable wrongs of an inmate of his kraal after such inmate has contracted as customary union but whilst he continues to reside at such kraalhead's kraal, does not appear to have been decided. The only cases dealing with this aspect that I have found, have reference to other tribes. Under Pondo law this question has been decided in the affirmative, see Fono *v.* Tomose, 1930, N.A.C. (C. & O.) 48, whereas amongst the Basuto, Hlubi, Baca, Xesibe and Hlangwini tribes the contrary obtains, see Gqoboka *v.* Magxaba and Xwara, 3 N.A.C. 274. Here it should be mentioned that the statement in Gonyela *v.* Sinxoto, 2 N.A.C. 69 that the decision in Gunyani *v.* Modesane, 1 N.A.C. 255 is of general application, i.e. that a kraalhead is not liable for the delicts of a married inmate appears to refer only to the tribes specified in Gqoboka's case as both that case and Gonyela's were heard at Kokstad and the Native Assessors in both cases apparently came from the same districts.

The question was put to the Tembu Assessors whose replies (which are appended) show that their custom is similar to that of the Pondos, viz. that a kraalhead is liable for the actionable wrongs of an inmate of his kraal even after such inmate has contracted a customary union if the latter continues to reside at such kraal.

I am in agreement with this opinion but would point out that the qualification mentioned by the Assessors, viz. that a kraalhead's liability is contingent upon the inmate's not having sufficient livestock to meet the damages in full, is not capable of application in that it has been laid down that the kraalhead and inmate concerned must be sued jointly, see Rubulana *v.* Tungana, 1 N.A.C. 90 (at the foot of page 91) and it is open to the inmate to dispose of his stock even after judgment has been given against him provided he does so before it is atatched in pursuance of such judgment.

Proceeding to a consideration of the evidence in the instant case, it is manifest that the plaintiff himself has no personal knowledge of whether the first defendant resided at the second defendant's kraal or had a separate kraal when he seduced Vuyiswa. That this is the position is apparent from the plaintiff's evidence " If second defendant says first defendant has his own kraal, I could not dispute it." It is true that the plaintiff stated that when he made the customary report to the second defendant the latter intimated that he would go into the matter with his son, the first defendant, and later asked for more time to do so. But the second defendant's attitude here does not amount to an admission that he, himself, was liable and, therefore, does not assist the plaintiff. It is also true that the plaintiff stated that when he spoke to the second defendant the latter had said that the first defendant was staying at his kraal and that, therefore, he (second defendant) and the plaintiff should decide the matter. But this statement may well have reference

only to the first defendant's stay at the second defendant's kraal when the former was there for a few weeks on holiday and during which period, it is common cause, he seduced Vuyiswa, so that this evidence also does not assist the plaintiff.

It is manifest from Vuyiswa's evidence that she also has no personal knowledge of the first defendant's place of residence when he seduced her.

The evidence of the only remaining witness for the plaintiff to testify on this aspect, viz. that of Headman Julius Mbalo, is obviously so inconsistent that it cannot be regarded as reliable.

As pointed out by Counsel for appellant, there are unsatisfactory features in the defence evidence which indicate that the second defendant has not established his case. But in the light of what has been said above, i.e. in the absence of acceptable evidence for the plaintiff that the first defendant was resident at the second defendant's kraal when he seduced Vuyiswa, the unsatisfactory features in the defence evidence do not assist the plaintiff to discharge the onus of proof resting on him in this respect on the pleadings; nor, in the circumstances, does the fact that the defence failed to call certain witnesses, viz. Sebenzile and Mafa's widow, do so.

Counsel for appellant contended that the first defendant's stay at the second defendant's kraal for the few weeks whilst he was on holiday when he seduced Vuyiswa rendered the second defendant liable for this delict.

But is is manifest from the evidence that this stay in itself amounted to no more than a visit as it is common cause that the first defendant's wife was at Cape Town at the time and the first defendant explained that he did not have anyone to cook for him or do his washing at his own kraal and for this reason stayed at the second defendant's kraal. This stay, therefore, did not render the second defendant liable, see Fandesi *v.* Ntsizi and Ntsizi, 4 N.A.C. 13, at page 14. Nor in the circumstances does the fact that the first defendant's wife stayed at the second defendant's kraal for about a month before she joined him (1st defendant) in Cape Town indicate that the latter was resident at the second defendant's kraal as it is clear that during this period the first defendant was at Cape Town and his wife was on her way to join him there.

Here it should be mentioned that I am not unmindful of the decisions of this Court in Skenjana *v.* Guza & Ors., 1944 N.A.C. (C. & O.) 102 and Mhlokonyelwa *v.* Ngoma, 1 N.A.C. (S.D.) 197. But, with respect, it seems to me to be difficult to distinguish between a "casual" and a "temporary" visit particularly as it has been laid down in *ex parte* Minister of Native Affairs, 1941 A.D. 53, at page 59, that a temporary visit cannot be regarded as residence; and, as pointed out in that case, no precise definition of "residence" can be given and each case falls to be decided on its merits.

A further point calls for comment and that is the reliance placed by the Assistant Native Commissioner, according to his reasons for judgment, on the contents of a certain permit which was not produced. There is nothing to show that the permit had been lost or destroyed or was otherwise not available and that proper search had been made for it so that it was not competent for the Assistant Native Commissioner to take cognizance of the secondary evidence adduced in connection with the permit, see Rex *v.* Amod & Co. (Pty.), Ltd. and Another, 1947 (3) S.A. 32, at page 40. It is perhaps as well to add that in any event there is nothing to indicate that the permit is excluded from the hearsay rule so as to permit of its being admitted in evidence on its mere production as proof of the facts shown by the entries therein, see Rex *v.* De Villiers, 1944, A.D. 493, at pages 500 to 502, and Hassim *v.* Naik, 1952 (3) S.A. 331 (A.D.)

It is clear from what has been stated above that neither party has established his case on the question of the first defendant's residence at the time of the seduction in question so that the Assistant Native Commissioner's judgment dismissing the summons against the second defendant, which is the equivalent of an absolution judgment, see Becker *v.* Wertheim, Becker & Leveson, 41 P.H., F. 34 (A.D.), cannot be said to be wrong and the appeal should accordingly be dismissed, with costs.

Opinion of Native Assessors.

Assessors in Attendance.

(1) Aaron Mgudlwa, Tembu Assessor from St. Marks District.

(2) John Ngcwabe, Tembu Assessor from St. Marks District.

(3) Archibald Mzazi, Tembu Assessor from Glen Grey District.

(4) Stewart Zote, Tembu Assessor from Glen Grey District.

Question by President:

Is a kraalhead liable under Tembu law and custom for an actionable wrong or delict committed by an inmate of his kraal after the latter has contracted a customary union, but has continued to reside at such kraal.

Reply by Archibald Mzazi:

If the kraalhead has provided the dowry for such inmate, the kraalhead is liable only if the inmate has no stock of his own.

Reply by Aaron Mgudlwa:

If an inmate of a kraal has grown up at such kraal and whilst still residing there he commits an actionable wrong, the kraalhead is liable irrespective of whether the inmate has contracted a customary union or not, if the inmate has no stock.

Reply by Stewart Zote:

I agree with Archibald Mzazi and Aaron Mgudlwa.

Reply by John Ngcwabe:

A kraalhead would not be liable for an actionable wrong of a former inmate who has married and established his own kraal. The kraalhead would be liable for his son's actionable wrong even after he had provided him with a wife if the kraalhead allows such son to remain at his (kraalhead's) kraal.

Further reply by Aaron Mgudlwa:

The kraalhead is liable for the actionable wrongs of his sons if, after providing them with wives, they continue to live at his kraal.

Archibald Mzazi and Stewart Zote agree with the last speaker.

Question by Mr. Warner:

If the son were in employment and had no stock would the kraalhead be liable?

Reply by Archibald Mzazi:

The son's earnings go to his father and the father remains liable if the son has not established his own kraal.

Reply by Aaron Mgudlwa:

I agree with Archibald Mzazi. This custom was in being before sons went out to work.

Reply by Stewart Zote:

I agree with the two previous speakers

Reply by John Ngcwabe:

I agree with Archibald Mzazi and Aaron Mgudlwa if the son is unmarried. Custom demands that a married son should be given a separate kraal, but if the kraalhead does not do so the latter is liable even if the son is in employment. If the married son has stock it will be attached to satisfy the judgment debt in respect of the damages for the actionable wrong.

All the other assessors agree that a married son's stock must be attached before the kraalhead's stock is attached.

E. J. H. Yates (Member): I concur.

C. H. Warner (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

NORTH-EASTERN NATIVE APPEAL COURT.

MAODI *v.* **MAODI.**

N.A.C. CASE No. 84 OF 1956.

PRETORIA: 7th December, 1956. Before Steenkamp, President, Cowan and O'Connell, Members of the Court.

PRACTICE AND PROCEDURE.

System of law applied—Locus standi in judicio *of Native woman.*

Summary: Plaintiff, a Native woman who had been divorced from defendant claimed from him the custody of her minor child born to her by another man prior to her marriage to her husband. Defendant contended that he was the father of the child. An application to the Native Commissioner for absolution at the close of plaintiff's case was granted on the ground that she had no *locus standi in judicio.*

Held: That the Native Commissioner acted prematurely in that he had not decided whether defendant was the father of the child or not.

Held: That if defendant were the father of the child the plaintiff, his one-time wife, was entitled to sue for its custody in the same way as if she were a European by virtue of Section *eleven* of Act No. 38 of 1927.

Held: That it is obvious that a Native woman cannot under Native Law and Custom sue unassisted—Section *eleven* (2) of Act No. 38 of 1927.

Statutes, etc. referred to:

Section *eleven* (2) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Pretoria.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, a Native woman, unassisted, sued the defendant for an order directing him to return to her a minor child, Mashilo Nkomishe. In her particulars of claim the plaintiff states she is the guardian nad the mother of this child which in her evidence she states was given birth to by her before she married defendant and that a man by the name of Patrick Mocpi is the father of the child.

In her claim she further alleges that she and the defendant were married by civil rites but that this marriage had been dissolved by a decree of divorce on the 7th November, 1946, and that during the subsistence of the marriage between her and defendant the child came into the custody of the defendant and he has now, since she has been divorced from him failed to return the child to her. Defendant in his plea avers that he is the father of the child in question.

Defendant has filed an alternative plea to the effect that in the event of the Court overruling his main plea but not otherwise he pleads that about November, 1946, the plaintiff voluntarily agreed to and delivered to him this child and agreed to him having the custody thereof. There is no indication in the record at the commencement of the proceedings whether the case was being tried according to Native Law and Custom or according to Common Law, nor is there any indication before the Native Commissioner gave judgment which system of law he applied. There is, however, an indication in his reasons for judgment that he applied Native Law and Custom.

At the close of plaintiff's case the attorney for defendant applied for an absolution judgment on the ground that plaintiff had no *locus standi in judicio* to sue. The application was acceded to and the summons was dismissed with costs.

An appeal has been noted to this Court on the ground that the judgment is bad in law in that the learned Native Commissioner erred in holding that plaintiff has no *locus standi in judicio* to bring an action in the Native Commissioner's Court for the delivery to her of the child.

When it is considered that there is a dispute in the pleadings as to whether the defendant is or is not the father of the child it seems to us that the Native Commissioner acted rather prematurely in dismissing the summons until such time as he finds whether or not the defendant was the father of the child. If the defendant is the father of the child then the mother of that child who was at one time the legal wife of the defendant is entitled to sue for the custody of the child and therefore according to section *eleven* of the Native Administration Act No. 38 of 1927 her capacity is the same as that of a European. It follows that if the child is legitimate then Common Law is applicable in this case.

Counsel for appellant has stressed the fact that nowhere during the course of the proceedings did the Native Commissioner indicate what system of law he is applying and if he had done so earlier in the proceedings by mentioning that he was applying Native Law and Custom the incapacity of the plaintiff could have been cured on application. It is obvious that a Native woman cannot under Native Law and Custom sue unassisted. This is clear from the wording of section *eleven* (2) of the Native Administration Act.

In the circumstances the appeal is allowed with costs and the Native Commissioner's judgment is set aside and for the words appearing on page 15 "Application granted and summons dismissed with costs of suit" are substituted the words "Application refused."

The Court is aware of the fact that the presiding Native Commissioner has been transferred and it is suggested that the case be heard *de novo* by another judicial officer on the same pleadings subject to any amendment that might be made and granted.

For Appellant: Adv. D. Spitz, instructed by Helman & Michel.

Respondent in person.

SENTRALE NATURELLE APPELHOF.

MJOBO en 'n ANDERE *teen* CHAANA.

SAAK No. 25 VAN 1956.

KROONSTAD: 7 Desember 1956. Voor Wronsky, Voorsitter, Menge en Blomerus, lede van die Hof.

NATURELLEGEBRUIKE.

Teruggawe van bruidskat—Pligte van ontvanger van bruidskat—Diskresie insake koste.

Samevatting: In 'n geding vir die teruggawe van 'n bruidskat t.o.v. 'n huwelik wat deur die bruid se breuk van troubelofte verydel is—

Beslis (op die feite soos in die uitspraak uiteengesit):

(*a*) dat die ontvanger van die bruidskat dit aan die bruid se vader moet oorhandig of in bewaring moet hou totdat die huwelik plaasvind, en dat hy aanspreeklik bly as dit deur 'n derde persoon verteer word;

(*b*) dat enige betaling t.o.v. bruidskat wat die bedrag waaroor ooreengekom was oorskrei nie in 'n eis vir betaling van bruidskat inbegrepe is nie; en

(*c*) dat 'n party wat 'n onreg veroorsaak maar weens tegniese redes nie aanspreeklik gehou kan word nie nogtans sy koste kan verbeur.

Appèl vanaf die Hof van Naturellekommissaris, Steynsrus.

Menge, Permanente Lid, lewer uitspraak van die Hof:—

In hierdie geding word die verweerders, 'n Naturelle vrou en haar broer, aanspreeklik gehou vir die terugbetaling van 'n bruidskat van £66 en drie beeste of hul waarde, £54; d.w.s. 'n totale bedrag van £120. Die eiser het die bedrag ten behoewe van sy seun betaal wat met die dogter van die eerste verweerder wou trou. Na betaling van die bruidskat, en nog voordat die partye saamgeleef het, was die huwelik onmoontlik gemaak deur die meid se besluit om met iemand anders te trou. Die onderhandelinge was met die tweede verweerder aangeknoop en hy het ook die bruidskat ontvang. Hy het die bedrag aan eerste verweerder oorhandig en sy het dit blykbaar verbruik en is dus nie meer in staat om dit terug te gee nie. Dit blyk ook dat haar man van wie sy geskei is, en wie die voog van die meid is volgens naturelle reg, nog leef.

Die verweer ontken nie die betaling van die bruidskat nie maar betwis die eerste verweerder se aanspreeklikheid op grond daarvan dat sy 'n Naturellevrou is. Die aanspreeklikheid van die tweede verweerder word betwis op grond daarvan dat hy, na beweer word, nie as voog van die meid en as ontvanger van die bruidskat opgetree het nie.

Die Naturellekommissaris het uitspraak gegee teen die tweede verweerder met koste.

Teen hierdie uitspraak kom die twee verweerders nou in hoër beroep op grond daarvan dat die bevinding strydig is met die oorwig van die getuienis; dat die tweede verweerder nie regtens aanspreeklik is nie indien hy soos bevind die bruidskat aan eerste verweerder oorhandig het, en dat koste teen die eiser aan eerste verweerder behoort toegestaan te gewees het.

Dit is duidelik dat die Naturellekommissaris geen moeite gespaar het om alle aspekte van die getuienis deeglik te oorweeg, en ons insiens is sy gevolgtrekking korrek. Dit is nie nodig om enigiets by sy breedvoerige redenering by te voeg nie.

Wat die tweede grond van appèl betref was dit die plig van die tweede verweerder òf om die bruidskat in bewaring te hou totdat hy die meid in die huwelik kon gee, òf om dit aan die meid se vader te oorhandig. Deur die bruidskat aan die moeder toe te vertrou kon hy nie sy aanspreeklikheid vir die teruggawe daarvan vryspring nie.

Wat betref die eerste verweerder se koste is hier wel 'n afwyking van die gewone reël dat die suksesvolle party sy koste behoort te kry. Maar as daar in ag geneem word dat die eerste verweerder die oorsaak van al die moeilikheid is, dat sy volgens haar eie getuienis nogal as kraalhoof opgetree het, en wederregtelik die bruidskat grotendeels vir haar eie voordeel verbruik het, dan kan nie gesê word nie dat die Naturellekommissaris se uitspraak in verband hiermee onreg laat geskied.

Die appél faal dus.

Die Naturellekommissaris se uitspraak is egter nie geldig soos dit staan nie. Die eiser is nie geregtig op die teruggawe van meer as £75 nie. Sy saak berus daarop dat daar 'n ooreenkoms was om 15 beeste te betaal, en dat die bedrag van £66 en drie beeste gelyk gestaan het met 15 beeste. Maar sy getuienis stel ook die waarde van een bees op £5 vas. Gevolglik was £81 betaal, alhoewel slegs t.o.v. £75 ooreengekom is. Alleen £75 kan teruggevorder word as terugbetaalbare bruidskat—nie £81 nie en nog minder £120, want daar was geen verdere eis op grond van *solutio indebiti* nie. Bowendien behoort daar 'n uitspraak te wees wat verweerder No. 1 betref.

Die appèl word met koste van die hand gewys; maar die uitspraak van die Naturellekommissaris word deur die volgende bewoording vervang: "Vir eiser met koste teen verweerder No. 2 t.o.v. 15 beeste of £75. Absolusie van die instansie teen verweerder No. 1."

Vir Appellante: Mnr. J. M. Dreyer.

Vir Verweerder: Mnr. N. Lange.

CENTRAL NATIVE APPEAL COURT.

MACHAKA *v.* **SERIPE.**

N.A.C. CASE No. 22 OF 1956.

JOHANNESBURG: 19th December, 1956. Before Wronsky, President, Menge and Garcia, Members of the Court.

MAINTENANCE.

Ordinance No. 44 *of* 1903 (T)—*Essentials of claim—Form of Summons.*

Summary: The appellant appealed against an order made against him by the Native Commissioner under Ordinance No. 44 of 1903 for the payment of maintenance in respect of the illegitimate child of the respondent.

Held: That the order was not competent in the absence of any allegation and proof that the child was without adequate means of support.

Cases referred to:

Rantsoane *v.* Regina, 1952 (3) S.A. 281.
Rex *v.* Gordon, 1948 (3) S.A. 937.
Rex *v.* Safeda, 1950 (2) S.A. 55.

Appeal from the Court of the Native Commissioner, Randfontein.

Wronsky, President (delivering judgment of the Court):—

At the hearing of this appeal on the 26th October, 1956, both the appellant and his counsel were in default and the appeal was accordingly struck off the roll. On the 2nd October, 1956, a petition was filed setting out the reasons for non-appearance by the appellant's attorney, Mr. J. Fine, with a prayer to grant an order—

(*a*) rescinding the judgment dismissing the petitioner's appeal on the ground of default on the 26th October, 1956; and

(*b*) re-opening the said appeal and granting the petitioner leave to argue same before this Honourable Court.

After hearing Mr. Fine the Court finds that he was not in wilful default and granted the application.

The Respondent who was not represented did not oppose the application.

The appellant was summoned to appear before the Native Commissioner's Court on the complaint of the respondent that he should show cause why an order under section *ten bis* of Act No. 38 of 1927, read with the provisions of the Deserted Wives and Children's Ordinance, No. 44 of 1903, should not be made against him to maintain or contribute towards the maintenance of the child Emily.

No further particulars in regard to the claim are given in the original complaint.

The enquiry was held on the 9th August, 1956, at which the respondent and her two sisters gave evidence followed by appellant himself. The Native Commissioner made an order which reads *inter alia*: "being satisfied that the child is without means of support and that the father is able to maintain it or to contribute to its maintenance..... it is hereby ordered that appellant pay the sum of £2 per month towards the maintenance of his child Emily".

Against this order an appeal is lodged on the following grounds that:—

1. The Honourable Native Commissioner at Randfontein had no jurisdiction to investigate and hear the matter as same was *lis pendens* and was pending in the Native Commissioner's Court at Johannesburg.

2. The summons issued against the appellant disclosed no cause of action.

3. The Honourable Commissioner *erred* in finding on the evidence adduced that the appellant was the father of the child Emily born to plaintiff and in ordering the defendant to pay maintenance for such child.

It has been laid down that before an order may be made in terms of the Ordinance the following requirements must be satisfied—see Rex *v.* Rantsoane, 1952 (3) S.A. at page 286:—

(1) The child for whom maintenance is claimed is under fifteen years of age.

(2) The child for whom maintenance is claimed is the child of the father who is summoned.

(3) The child for whom maintenance is claimed has been left by the father without adequate means of support.

(4) The father of the child can afford to maintain it.

Although the evidence produced may fulfil the requirements of numbers 1, 2 and 4, that of number 3 requires consideration.

There is nothing in the summons to show that the child is without adequate means of support nor has the respondent given any evidence to support this contention. The evidence reveals that respondents has another illegitimate child by another man but it is not stated whether maintenance is being paid to her in respect of that child by its natural father. The respondent despite having the previous child apparently continued in her profession as teacher up to November, 1955, and there appears to be no reason why she cannot again find employment and support her children.

The first ground of appeal was abandoned.

As there was no evidence to prove that the child Emily was left without adequate means of support—one of the essential elements in a claim of this nature, this Court finds that the Native Commissioner had no right to grant the order he did and consequently the appeal must succeed. This does not debar a fresh enquiry in terms of the Ordinance.

The appeal is allowed with costs and the order of the Native Commissioner is set aside.

The attention of the Native Commissioner is drawn to the fact that it is a requirement of Ordinance No. 44 of 1903, that the summons in an enquiry of this nature must be issued by the Native Commissioner himself and not by the Clerk of the Court. If the summons is not issued by the Native Commissioner and the respondent fails to appear in Court he is not in default. See the cases Rex *v.* Gordon, 1948 (3) S.A. at page 937 and Rex *v.* Safeda, 1950 (2) S.A. at page 55.

For Appellant: Mr. J. Fine.

Respondent in person.

CENTRAL NATIVE APPEAL COURT.

CHIRWA and ANOTHER *v.* MANDAH.

N.A.C. CASE No. 28 OF 1956.

JOHANNESBURG: 21st December, 1956. Before Wronsky, President. Menge and Garcia, Members of the Court.

NATIVE CUSTOM.

Assault in Native Law—Liability of kraalhead for delicts of inmates—Refund of dowry—Jurisdiction of Union Courts as to foreign Native law—Leading fresh documentary evidence on appeal—Condonation of failure to file plea—Section 15 of Act No. 38 of 1927.

Summary: The respondent, plaintiff in the Court below, had been awarded damages for assault against both defendants and a refund of certain dowry against first defendant. It was alleged that the assault was committed by the second defendant whom the plaintiff was to marry; that certain dowry had been paid for her, and that in consequence of

the assault the marriage did not take place. The parties were Natives from Nyasaland. On an appeal brought by the defendants—

Held: That South African law and custom is applicable in an action between foreign Natives for the return of *lobolo* where there is nothing to indicate that any foreign Native law and custom was to govern the transaction or reelationship between the parties.

Held further: That dowry payments can only be reclaimed if made pursuant to a proper consensual contract either as *lobolo* or as an earnest payment.

Held further: That in Native law an assaulted person has no compensatory right of action against his aggressor.

Held further: That there is no provision for the production of fresh documentary evidence on appeal.

Held lastly: That in the circumstances of this case the failure of the second defendant to plead could on appeal be condoned.

Quare: Whether in the application of Native law under Section 11 of Act No. 38 of 1927 the Union Courts are restricted to the laws and customs of the tribes of the Union of South Africa.

Statutes cited:

Sections *eleven* and *fifteen* of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge, Permanent Member (delivering judgment of the Court):—

In this matter summons was originally issued by plaintiff's attorneys against James Chiule Chirwa as first defendant and one R. C. Chirwa as second defendant. There were two claims: one (claim A) against both defendants for £150 damages in respect of an assault alleged to have been committed on plaintiff by the first defendant's minor daughter named Melvin Kayela Chirwa and another (claim B) against the first defendant only for the refund of £30. 0s. 6d. being dowry in respect of the intended marriage of the plaintiff and the said daughter, which marriage did not materialise. In neither claim is there any allegation whatsoever against R. C. Chirwa. He did not appear to defend the action and summons was not even served on him; but at the hearing the first defendant's minor daughter was substituted as second defendant duly assisted by the first defendant. Counsel for plaintiff before us endeavoured to argue that this substitution of the first defendant's daughter as second defendant in the place of R. C. Chirwa applied also to claim B, but there is no foundation for that contention.

A plea was filed by the first defendant, James; but it is one of the many strange aspects of these proceedings that his daughter was not called upon to plead. James and his daughter were not represented at the hearing but both were present and gave evidence.

Evidence, much of it inadmissible, was heard on both claims and thereupon judgment was given for plaintiff on claim A for £15 and on claim B for £24. 10s. 6d.

Defendants appealed on the facts. The notice of appeal is very carelessly drafted. It cites R. C. Chirwa, instead of the girl Melvin Kayela as second defendant, and it does not state what part of the judgment is appealed against. There were at first three grounds of appeal. The first states that the judgment

is against the evidence and the weight of the evidence. The second is a repetition of the first in different words and the third, which reads: "the learned Commissioner erred in applying the law to the proven facts", is meaningless. Two further grounds of appeal—that inadmissible evidence has been admitted and that the Native Commissioner did not specify how he assessed his damages were added with the consent of this Court, no objection having been taken by counsel. Application was also made to adduce fresh evidence in the form of a certain letter at the hearing of the appeal, but this application was refused as there is no provision for such a procedure.

The first claim does not disclose a cause of action against the first defendant. Considered under common law, no liability rests on him in the absence of any allegation of guilty conduct on his part in connection with the assault committed by his minor daughter. Considered under Native Law there is no liability because Native Law does not afford the assaulted person a compensatory right of action against the aggressor or his kraalhead. Even if it had done so, as in Natal, it would have had to be alleged and proved that the tortfeasor was at the time an inmate of the kraal of the defendant. The summons contains no such allegation and what evidence there is is to the contrary. It is that of the first defendant's wife who said she does not want to stay with the second defendant and the latter's child, which seems to indicate that, as she was in fact staying with them, she was not staying with the first defendant; and consequently the second defendant, too, does not seem to have been staying with him.

As regards the second defendant the action was tried and judgment was given against her without a plea having been filed; but she gave evidence fully on the assault incident and this Court can, in these circumstances assume that no prejudice was caused and condone the omission of the plea under Section 15 of the Native Administration Act, 1927. Against the second defendant there is of course a right of action at common law. It is, therefore, necessary to examine the evidence on this claim.

(The evidence is then reviewed and thereafter the judgment continues as follows): Even if the injuries of which the plaintiff complains were inflicted in the course of that struggle it would not be possible to hold the second defendant liable.

As regards claim B, against the first defendant alone, a great deal of argument was heard by us on the question whether the Union Courts could administer foreign Native custom. Mr. Widman, for the appellant, contended that as the claim was for the return of *lobolo* under Native law and custom as defined in Act 38 of 1927, the Court could not apply the Customs of the Nyasaland tribes to which the parties belonged. He argued that in any event the Union Courts can only take judicial cognisance of the laws and customs of tribes of the Union. (The plaintiff had alleged that certain clothing purchased by him for his bride-to-be was not a gift to her but a part of the *lobolo* and given to the woman in accordance with Custom). Mr. Wolpe, counsel for the defence, referred to the definition of "Native" in the Native Administration Act and to Section 11 and contended that in the ordinary application of Native law and custom the Union Courts were not restricted to the laws and customs of the tribes of the Union of South Africa.

It is not necessary to decide this point. The claim is for the refund of *lobolo* which is a South African institution and there is nothing in the record to indicate that either of the parties desired any other customs than those of the Natives of South Africa to govern their affairs. It follows that whatever is reclaimed must be shown to have been paid in terms of a proper consensual contract either as *lobolo* or as an "earnest payment",

Claim B is made up of two items: £12 (not £12. 10s. as stated in the summons) paid as dowry and the clothes already referred to which the plaintiff purchased for the defendant's daughter. Whether the £12 were paid as dowry or, as the defendant maintains, as an engagement fee, in either case the money is refundable when the marriage does not materialise, the more especially if, as in this case, the woman is to blame for the rupture. And in this connection the letter, Exhibit E, is of importance. In this letter the first defendant informed the plaintiff's marriage representative that his daughter had deliberately assaulted plaintiff and that she refused to marry him. This letter is, of course, not evidence as against the said defendant, and, in fact, she stated in evidence that she was quite prepared to continue with the marriage. But as regards the first defendant, the letter has the effect of estopping him from denying that she is the cause of the failure of the marriage to take place.

In regard to the clothes the Native Commissioner states in his reasons: "In Native law and custom it is the duty and privilege of the father of the girl to supply her with a wedding outfit and the plaintiff is entitled to claim a refund of this item of expenditure from the first defendant on second defendant's refusal to go through with the marriage". Whatever the duty and privilege of the father may be, in this case there is not sufficient evidence to connect the first defendant with the clothes purchased by the plaintiff for the defendant's daughter nor to support the allegation that this money spent on clothes formed part of the dowry. There is only the evidence of plaintiff who said: "A *lobolo* agreement was entered into whereby I had to pay £12 *lobolo* and buy her clothes." This allegation is too vague to serve as evidence of an agreement concerning dowry, beyond the amount of £12. The plaintiff's representatives who testified to having arranged the marriage and to paying the £12 made no mention of any such obligation. Consequently the clothes purchased for the woman cannot be claimed from her father under Native law and custom as refundable dowry nor under any principle known to common law.

In the result then the appeal is upheld with costs and the Native Commissioner's judgment is altered to read: "On claim A absolution from the instance. On claim B for plaintiff for £12. The first defendant to pay half the costs of the action."

For Appellant: Mr. A. B. Widman.

For Respondent: Adv. H. Wolfpe, instructed by Messrs. Alec M. Edelson & Kantor.

OFFICERS OF THE NATIVE APPEAL COURTS.
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NORTH-EASTERN NATIVE APPEAL COURT.
NOORDOOSTELIKE NATURELLE-APPÉLHOF.

PRESIDENT: J. H. STEENKAMP.

PERMANENT MEMBER/PERMANENTE LID: R. ASHTON.

REGISTRAR/GRIFFIER: P. O. GORDON.

CENTRAL NATIVE APPEAL COURT.
SENTRALE NATURELLE-APPELHOF.

PRESIDENT: R. WRONSKY.

PERMANENT MEMBER/PERMANENTE LID: W. O. H. MENGE.

REGISTRAR/GRIFFIER: B. WOLVAARDT.

SOUTHERN NATIVE APPEAL COURT.
SUIDELIKE NATURELLE-APPÉLHOF.

PRESIDENT: H. BALK.

PERMANENT MEMBER/PERMANENTE LID: H. W. WARNER.

REGISTRAR/GRIFFIER: E. J. BRIGG to/tot 6.8.56. A. W. LEPPAN from/vanaf 6.8.56.

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